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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)	
)	PERB Case No. 16-UM-01
Petitioner)	16-UC-01
and)	Opinion No. 1648
)	
District of Columbia Water and Sewer Authority)	
)	
Respondent)	

DECISION AND ORDER

I. Introduction

On March 31, 2016, the American Federation of Government Employees, Local 631 (“AFGE Local 631”) filed two identical petitions, a “Unit Clarification Petition or in the alternative a Unit Modification Petition.” These two cases are now consolidated and this Decision and Order will address both cases. A hearing was held on February 15 and March 6, 2017. The Hearing Examiner issued a Report and Recommendation (“Report”) on August 29, 2017. The District of Columbia Water and Sewer Authority (“WASA”) filed exceptions to the Report on September 20, 2017. The Report is now before the Board for consideration

For reasons stated below, the Board affirms the Hearing Examiner’s Report and Recommendation to include Contract Compliance Specialists I, Contract Compliance Specialists II and the Laboratory Quality Assurance Officer in the bargaining unit, and grants the unit modification petition to include the Permits Office in the bargaining unit.

II. Statement of the Case

On November 22, 1996, AFGE Local 631 was certified as the exclusive representative of a unit of:

All professional and nonprofessional employees of the District of
Columbia Water and Sewer Authority, Office of Engineering

Services and Bureau of Waste Water Treatment, Laboratory Division; and all nonprofessional and professional employees in the Bureau of Wastewater Division; and the Office of Administrative Services, Water Conservation Division and the Procurement and Facilities Division, Good and Services Branch; excluding all management officials, confidential employees, supervisors, 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 2-139.¹

AFGE Local 631 now seeks the inclusion of 11 positions at WASA in the certified unit. On May 26, 2016, AFGE Local 631 amended its petition to propose a new bargaining unit that includes the WASA Permits Office and to add the position of Officer Assistant III to the bargaining unit.²

Before the Hearing Examiner, the parties stipulated that they reached an agreement that the following three positions should be included in the bargaining unit: Engineer III Collection System Modeling with Job Code PO372, Specialist I Instrumentation and PCS with Job Code P0363, Specialist II Instrumentation, and PCS with Job Code PPO100.³ After the hearing the parties also notified the Hearing Examiner that they agree that the position of Office Assistant III is part of the bargaining unit.⁴ The parties further stipulated at the hearing that they agreed that the Permits Office should be included in the bargaining unit and the certification should include the name “permits office.”⁵

The parties do not agree on six positions: Contract Compliance Specialists I, Contract Compliance Specialists II, Laboratory Quality Assurance Officer, Process Engineer II, Program Manager-Capital Improvement Projects (CIP), and Senior Sourcing Specialist.⁶ WASA contends that these six positions are in management and therefore not eligible for inclusion in the bargaining unit. Furthermore, even if they were not management officials they still would not be eligible because they lack a community of interest with existing bargaining unit members.⁷ AFGE Local 631 states that the positions are not management officials and share a community of interest with the bargaining unit employees.⁸

III. Hearing Examiner’s Report and Recommendation

The Hearing Examiner first determined whether or not each of the six disputed positions were management officials. There is agreement between the parties that the six disputed

¹ *AFGE Local 631 and WASA*, 43 D.C. Reg. 1969, PERB Case No. 96-RC-01, Slip Op. No. 463 Certification No. 92 (1996).

² Report and Recommendations at 2.

³ Report and Recommendation at 2.

⁴ Report and Recommendation at 2.

⁵ Hearing Transcript at 13.

⁶ Report and Recommendations at 2.

⁷ Report and Recommendations at 2.

⁸ Report and Recommendations at 2.

categories are not supervisory within the meaning of sections 1-617.01(d) and 1-617.09(b)(1) of the Comprehensive Merit Personnel Act (“CMPA”). The Hearing Examiner relied on the Supreme Court’s decision in *NLRB v. Bell Aerospace Co.*⁹ to define management official as: “One who formulates and effectuates management policies by expressing and making operative the decision of their employer.” Relying on the Supreme Court’s opinion in *NLRB v. Kentucky River Community Care, Inc.*,¹⁰ the Hearing Examiner stated that the agency has the burden to establish that each position falls within the exception of section 1-617.09(b)(1). The Hearing Examiner further stated that the duties and authority of the position determine “management official” status, not the title.

A. Management Authority

The Hearing Examiner concluded that WASA did not meet its burden of establishing that the Contract Compliance Specialists I & II are management officials. These positions are responsible for monitoring existing Equal Employment Office (“EEO”) practices and the mandatory employee benefit compliance of contractors doing business with the agency.¹¹ According to the Hearing Examiner, the work of these positions is essentially enforcement and recruitment and does not amount to policy making or to effectively recommending policy.¹² The Hearing Examiner concluded that the Contract Compliance Specialists I and II are not management officials within the meaning of section 1-617.09(b)(1).

The Hearing Examiner concluded that WASA did not meet its burden of establishing that the Laboratory Quality Assurance Officer (“LQAO”) position is in management.¹³ The primary duty of the LQAO is to assure that the water and wastewater system meets the appropriate standards.¹⁴ The guidelines for the measurement of water cleanliness are mandated by the Environmental Protection Agency (“EPA”).¹⁵ The LQAO is an important part of the quality control program at the Authority, but the Hearing Examiner stated that this does not amount to “management” as the term is used in section 1-617.09(b)(1). In fact, quality control work under the National Labor Relations Act is generally considered to be bargaining unit work.¹⁶

According to the Hearing Examiner, WASA met the burden of establishing that the Process Engineer II positions are management officials. Relying on testimony from a former Process Engineer II, the Hearing Examiner concluded that the positions have broad-ranging responsibilities and the record supports the contention that they are heavily relied upon in the operation WASA’s wastewater program.¹⁷ The Hearing Examiner concluded that the Process Engineer II is a management official within the meaning of section 1-617.09(b)(1), and should not be included in the unit

⁹ 416 U.S. 267, 288 (1974).

¹⁰ 532 U.S. 706 (2001).

¹¹ Report and Recommendations at 5.

¹² Report and Recommendations at 6.

¹³ Report and Recommendations at 8.

¹⁴ Report and Recommendations at 7.

¹⁵ Report and Recommendations at 8.

¹⁶ Report and Recommendations at 7.

¹⁷ Report and Recommendations at 10.

The Hearing Examiner concluded that WASA met its burden of establishing that the Program Manager – Capital Improvement Projects (“CIP”) position is a management official.¹⁸ The position is an important part of WASA’s long term planning process. The long term planning is mostly done by consultants or contractors and it is the Program Manager who represents the District of Columbia in its dealings with these consultants. The Program Manager manages, negotiates contracts, and oversees the work of the consultants.¹⁹ The Hearing Examiner states that the record reflects that the Program Manager effectively recommends actions to be taken and that her duties are aligned with the management of WASA.²⁰ The Hearing Examiner concluded that the Program Manager is a management official within the meaning of section 1-617.09(b)(1), and should not be included in the unit

The Hearing Examiner concluded that WASA met its burden of establishing that the Senior Sourcing Specialist is a management official.²¹ The Hearing Examiner relied on the testimony of Dan Bae, the Senior Sourcing Specialist, who stated that this position has purchase planning and strategy duties that are quite different than the Sourcing Specialists, who are in the bargaining unit.²² The Hearing Examiner concluded that the Senior Sourcing Specialist is a management official within the meaning of section 1-617.09(b)(1), and should not be included in the unit.²³

B. Community of Interest

After determining that some of the contested positions are not management officials, the Hearing Examiner next determined whether these positions should be included in the bargaining unit. WASA argued that these positions do not share a community of interest with the bargaining unit.²⁴ The Hearing Examiner stated that the record supported a finding of a community of interest sufficient to warrant inclusion of the Contract Compliance Specialists and the LQAO in the bargaining unit. These positions share common overall management, work location and working conditions; they are all part of a single integrated work force.²⁵

The Hearing Examiner did not accept WASA’s contention that the Contract Compliance Branch is so compartmentalized as to find they do not share a community of interest with the unit. Instead, the Hearing Examiner stated that there is insufficient evidence in the record that they are so isolated as to have no contact with unit employees.²⁶ The failure to include these positions in the bargaining unit would result in a small residual bargaining unit. The salary of the LQAO is considerably higher than many in the unit, but this fact alone does not warrant a finding that the LQAO lacks a community of interest with the unit.

¹⁸ Report and Recommendations at 13.

¹⁹ Report and Recommendations at 13.

²⁰ Report and Recommendations at 13.

²¹ Report and Recommendations at 15.

²² Report and Recommendations at 15.

²³ Report and Recommendations at 16.

²⁴ Report and Recommendations at 16.

²⁵ Report and Recommendations at 16.

²⁶ Report and Recommendations at 17.

IV. Exceptions to Hearing Examiner's Report and Recommendation

WASA filed Exceptions to the Hearing Examiner's Report. WASA stated that the Hearing Examiner's conclusions with regard to the positions of Contract Compliance Specialists I & II and the LQAO are not supported by substantial evidence in the record.²⁷ According to WASA, the Hearing Examiner reached contradictory conclusions by stating that the Process Engineer II is a management official and that the LQAO position is not. The Process Engineer II position, in operative and regulatory structure respects, mirrors the functionality of the LQAO, yet they are judged differently.²⁸ WASA stated that without a case-by-case analysis of the current and specific facets of each of the positions, the Report directly contravenes controlling statute and precedent.²⁹ Furthermore, WASA objected to the Hearing Examiner's conclusion that the Contract Compliance Specialists I & II share a community of interest with the current bargaining unit.³⁰

AFGE Local 631 filed Exceptions to the Hearing Examiner's Report. AFGE Local 631 states that the Hearing Examiner's Report regarding the following positions is contrary to law and erroneously applied the law and criteria for managerial employees: Process Engineer II, Sr. Sourcing Specialists and Program Manager (CIP). According to AFGE Local 631, the testimony of WASA managers and employers shows that the people holding these positions do not make operative decisions on behalf of the employer and the Hearing Examiner's recommendations should be rejected on this basis.³¹

V. Discussion

PERB reviews a Hearing Examiner's Report and Recommendation even if no exceptions are filed to determine whether the analysis and conclusions are reasonable, supported by the record, and consistent with precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.³² Mere disagreements with the Hearing Examiner's findings and citation of competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner's conclusions.³³ Parties cannot raise issues for the first time in exceptions if they were not presented to the Hearing Examiner.³⁴

²⁷ WASA Exceptions at 2.

²⁸ Report and Recommendations at 12.

²⁹ Exceptions at 8.

³⁰ Exceptions at 8.

³¹ AFGE Local 631 Exceptions at 6-7.

³² *FOP/MPD Labor Comm. v. MPD* 62 D.C. Reg. 3544 Op. No. 1506, PERB Case No. 11-U-50(a) (2015).

³³ *Brinkley v. FOP/MPD Labor Comm., District 20, Local 2087*, 60 D.C. Reg. 17387, Op. No. 1446, PERB Case No. 10-U-12 (2013).

³⁴ *Durant v. DOC*, 59 D.C. Reg. 9821, Op. No. 1286, PERB Case No. 07-U-43(a), 08-U-57 (2012).

The Board has held that a management official is one who formulates and effectuates management policies by expressing and making operative the decisions of his employer.³⁵ The Hearing Examiner applied this case law in finding that certain of the disputed positions did not express and make operative the policies used by WASA.

The Hearing Examiner found that WASA did not meet its burden of proof that the employee positions of Contract Compliance Specialists I, Contract Compliance Specialists II and the LQAO are management officials. Based on the record, the Hearing Examiner found that the Contract Compliance Specialist I and II work is essentially enforcement and recruitment.³⁶ The LQAO position also does not amount to management under section 1-617.09(b)(1).³⁷ Furthermore, the Hearing Examiner found that these two positions share a community of interest with the bargaining unit. Both parties filed exceptions stating that the Hearing Examiner findings are not supported by substantial evidence on the record. The Union also alleges that the Hearing Examiner did not properly apply the correct standard to determine if the positions were management officials. Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner. A review of the record reveals that the Hearing Examiner's findings and conclusions are reasonable, supported by the record and consistent with Board precedent.

The factors used to determine community of interest are stated in Section 1-617.09(a) of the CMPA. In considering whether there is a community of interest with other employees, the Board has previously looked to factors such as common supervision, skills, and benefits.³⁸ The Hearing Examiner concluded that each of these three positions share common overall management, work location and working conditions.³⁹ The Hearing Examiner noted that the three non-management officials share common benefits, working conditions and location with the bargaining unit positions.⁴⁰ The Board adopts the Hearing Examiner's conclusion that these three positions share a community of interest with the bargaining unit.

VI. Conclusion

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's recommendations to be reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's Report, and finds the Contract Compliance Specialist I, Contract Compliance Specialists II and LQAO positions are properly included in the bargaining unit. The following positions were not addressed by the Hearing Examiner because the parties came to an agreement that these positions belong in the bargaining unit: Engineer III Collection System Modeling with Job Code PO372; Specialist I Instrumentation and PCS with

³⁵ *AFGE, Local 2725 and D.C. Dep't of Housing and Community Development*, 45 DCR 2049, Slip Op. No. 532 at pgs. 4-5, PERB Case No. 97-UC-01 (1998) citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

³⁶ Report and Recommendations at 6.

³⁷ Report and Recommendations at 7.

³⁸ *AFGE, Local 631 and WASA*, 59 D.C. Reg. 6445, Slip Op. No. 1030, PERB Case No. 08-UC-01 (2012).

³⁹ Report and Recommendation at 16.

⁴⁰ Report and Recommendations at 17.

Job Code P0363; Specialist II Instrumentation, and PCS with Job Code PPO100; and Office Assistant III. The parties also agreed to include the Permits Office in the certification of the bargaining unit. The Board grants the unit modification petition to include the Permits Office in the bargaining unit once an official notice is posted by the employing agency for 14 days in compliance with PERB Rule 504.3.

ORDER

IT IS HEREBY ORDERED THAT:

1. The bargaining unit as described in PERB Case No. 96-UM-01 includes the employee positions of Contract Compliance Specialists I, Contract Compliance Specialists II and the Laboratory Quality Assurance Officer.
2. AFGE Local 631's Unit Modification Petition is granted. The bargaining unit as described in PERB Case No. 96-UM-01 is modified as follows:

All professional and nonprofessional employees of the District of Columbia Water and Sewer Authority, Office of Engineering Services and Bureau of Waste Water Treatment, Laboratory Division; and all nonprofessional and professional employees in the Bureau of Wastewater Division; and the Office of Administrative Services, Water Conservation Division and the Procurement and Facilities Division, Goods and Services Branch, and the Permits Office; excluding all management officials, confidential employees, supervisors, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

November 30, 2017

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 16-UM-01 and 16-UC-01, Op. No. 1648 was sent by File and ServeXpress to the following parties on this the 23rd day of January, 2018.

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Public
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GOVERNMENT OF
THE DISTRICT OF
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NOTICE

TO ALL EMPLOYEES, LABOR ORGANIZATIONS, AND AGENCIES ASSOCIATED WITH THE PERFORMANCE OF WORK AT THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

The American Federation of Government Employees Local 631 and District of Columbia Water and Sewer Authority (“Petitioners”) filed a Unit Modification Petition with the Public Employee Relations Board. Petitioners request that the Board include the Permits Office in the bargaining unit represented by the Petitioners.

Proposed Unit Description

All professional and nonprofessional employees of the District of Columbia Water and Sewer Authority, Office of Engineering Services and Bureau of Waste Water Treatment, Laboratory Division; and all nonprofessional and professional employees in the Bureau of Wastewater Division; and the Office of Administrative Services, Water Conservation Division and the Procurement and Facilities Division, Goods and Services Branch, and the Permits Office; excluding all management officials, confidential employees, supervisors, 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.

The Petitioners are requesting that the Board modify the unit description to include the Permits Office which was created in November of 2011 and formerly part of Engineering and Technical Services.

The purpose of this Notice is to inform employees, management and all labor organizations concerned with the Petition and to provide them with an opportunity to present their views on the Petition. Within fourteen (14) days after the posting of this Notice, any affected labor organization or person may file written comments. An affected labor organization that wishes to intervene in these proceedings may submit a written request to the Executive Director of the Board. Any comments or requests to intervene shall meet the requirements of Section 501 of the Board’s Rules.

PERB Case No. 16-UM-01.

This Notice was posted on the _____ day of _____, 2018.

THIS NOTICE MUST NOT BE ALTERED, DEFACED OR COVERED.

/s/ Clarene Phyllis Martin
Executive Director
January 24, 2018