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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
	)	
v.	)	Opinion No. 778
	)	
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.

## 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 180<sup>th</sup> 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 withdraw 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 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 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)<sup>1</sup>

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<sup>1</sup>The 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)

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 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 10<sup>th</sup> 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 10<sup>th</sup> 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 Complainant's February 11 notice, followed by its July 10<sup>th</sup> 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 11<sup>th</sup> and July 10<sup>th</sup> 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 (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 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.<sup>2</sup> 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.

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

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

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

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

A review of the record reveals that the WASA's exception amounts to no more than a disagreement with the Hearing Examiner's findings of fact. As previously noted, this Board has

determined that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's finding where the findings are fully supported by the record. American 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)<sup>3</sup>, 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.<sup>4</sup> However, she indicated that evidence of unlawful intent often is elusive. Therefore, she noted that the National Labor Relations Board has

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<sup>3</sup>The 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 ..."

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

stated that:

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.

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

With respect to costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. Of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). We observed:

[w]e believe such an award must be in the interest of justice. Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at 5.

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

whom it is the exclusive representative. In light of the above, we believe that the Hearing Examiner's finding is reasonable and supported by the record. As a result we deny WASA's exception and adopt the Hearing Examiner's finding.

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.

- (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**

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 04-U-02 was transmitted via Fax and U.S. Mail to the following parties on this the 9<sup>th</sup> day of March, 2005.

Barbara Milton, President  
AFGE, Local 631  
620 54<sup>th</sup> Street, N.E.  
Washington, D.C. 20019

**FAX & U.S. MAIL**

Kenneth Slaughter, Esq.  
Venable, Baetjer, Howard &  
Civilette, LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20004

**FAX & U.S. MAIL**

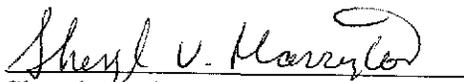
**Courtesy Copies:**

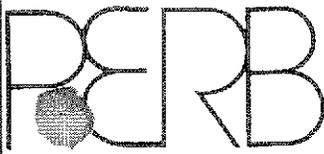
Stephen Cook, Labor Relations Manager  
D.C. Water and Sewer Authority  
5000 Overlook Avenue, S.W.  
Washington, D.C. 20024

**U.S. MAIL**

Brian Hudson, Esq.  
Venable, Baetjer, Howard &  
Civilette, LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, D.C. 20004

**U.S. MAIL**

  
\_\_\_\_\_  
Sheryl Harrington  
Secretary



Public  
Employee  
Relations  
Board

Government of the  
District of Columbia



717 14<sup>th</sup> Street, N.W.  
Suite 1150  
Washington, D.C. 20005  
[202] 727-1822/23  
Fax: [202] 727-9116

# NOTICE

**TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 778, PERB CASE NO. 04-U-02 (March 4, 2005)**

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

**WE WILL** cease and desist from violating D.C. Code § 1-617.04(a)(1), (3) and (5) by the action and conduct set forth in Slip Opinion No. 778.

**WE WILL** cease and desist from refusing to bargaining in good faith with the American Federation of Government Employees, Local 631, AFL-CIO, by failing to bargain over non-compensation matters for a successor agreement.

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

District of Columbia Water and Sewer Authority

Date: \_\_\_\_\_ By: \_\_\_\_\_  
General Manager

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14<sup>th</sup> Street N.W., Suite 1150, Washington, D.C. 2005. Phone: (202)727-1822.

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

March 9, 2005