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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. 08-UC-01
Complainant,	)	
	)	Slip Opinion No. 1030
and	)	
	)	
District of Columbia Water and Sewer Authority,	)	<b>Unit Clarification</b>
	)	
Respondent.	)	
	)	

**DECISION AND ORDER ON UNIT CLARIFICATION**

**I. Statement of the Case:**

On June 29, 2008, the American Federation of Government Employees, Local 631, (“Petitioner”, “AFGE” or “Union”) filed a unit clarification petition (“Petition”), in accordance with Board Rule 506.<sup>1</sup> The Petitioner seeks to clarify the scope of the unit with respect to three

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<sup>1</sup> The Petitioner is the exclusive representative of the following bargaining unit at WASA:

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 Treatment, Solid Processing Division, and Wastewater Division; and the Office of Administrative Services, Water Conservation Division and the Procurement and Facilities Division, Goods and Services Branch; excluding all management official, confidential employees, supervisors, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provision of Title XVIII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

(3) employee positions: Waste Water Treatment Plant Operator Trainee I (Trainee I), Engineering Management Trainee (EM Trainee),<sup>2</sup> and Senior Contract Administrator in the Procurement Department. The District of Columbia Water and Sewer Authority (“WASA” or “Respondent”) filed a Response to the Union’s Petition for Unit Clarification (“Response”). In addition, AFGE filed an amended petition asserting that the challenged positions were improperly excluded from the bargaining unit.

Pursuant to Board Rule 506.2, the Petition was referred to a Hearing Examiner. A hearing was held on November 16, December 10, and December 11, 2009. The Hearing Examiner issued a Report and Recommendation (R&R) on April 30, 2010. She found that the three (3) positions were properly excluded from the bargaining unit, and she is recommending that the Board deny AFGE’s petition. The Union filed Exceptions to the R&R and WASA filed an Opposition.

The R&R, AFGE’s Exceptions, and WASA’s Opposition are before the Board for disposition.

## II. Hearing Examiner’s Report, AFGE’s Exceptions and WASA’s Opposition

The Hearing Examiner stated that the “January 2007 Position Description...for **Trainee I** identifies the position as non-union, temporary and non-supervisory. [emphasis added]. It describes the position as part of a two year training program which includes classroom and on-the-job training to prepare the individual to be certified and then advance to the Trainee [II] position. The [Hearing Examiner noted that the position description] states that the individual works under the ‘close supervision of the Foreman or Journeyman WWT Plant Operator’ and assists with performing duties. During the first year, the Trainee receives no benefits. At the Trainee [II] level, the employee becomes a full-time probationary employee with benefits.” (R&R at p. 4). (All references to exhibits are omitted.)

The Hearing Examiner also found that the “[v]acancy [a]nnouncement...for the **[Engineering Management Trainee] EM Trainee** position [described the position] as non-union and full-time. [emphasis added]. The [vacancy announcement] states in pertinent part, that the EM Trainee is in a two year program which will provide the EM Trainee with experience in all five of WASA’s operational departments. According to the ... [vacancy announcement], the ET Trainee assists the operational department engineering managers in a number of ways,

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Certification No. 92 (November 22, 1996). (R&R at pgs. 3-4). This certification consolidated bargaining units represented by Local 631 at WASA. There are five (5) departments at WASA: (1) maintenance; (2) sewer; (3) water; (4) engineering; (5) wastewater. (See R&R at p. 9).

<sup>2</sup> On July 3, 2008, the Petitioner filed a document styled “Union’s Motion to Amend the Petition for Unit Clarification” (“amended petition”), requesting that the position of Engineering Management Trainee also be included in the bargaining unit.

including: reviewing proposals to determine time frames, funding limitations, staffing requirements and allocation of resources.” (R&R at p. 4).

Furthermore, the Hearing Examiner found that the “October 2007 [vacancy announcement] for the SCA [**Senior Contract Administrator**] position identifies it as non-union, at-will and full-time. [emphasis added]. [She stated that the] duties are described in pertinent part, as: ‘Administers the larger and/or more complex procurements, and provides guidance and direction to lower level contract specialists...Evaluates, formulates and effectuates the Procurement policies of the Authority...Directs work of Contract Specialists assigned to assist with larger, more complex procurements....Develops the negotiation position and leads negotiations with contractors....’” (R&R at p. 5).

Before the Hearing Examiner, AFGE argued that the three (3) positions share a community of interest with bargaining unit members. (See R&R at p. 5). Union President Barbara Milton is employed as a Civil Engineering Technician in the Department of Engineering and Technical Services. She testified that Trainee I employees were being trained hands-on with operators in the bargaining unit, and the operators informed her that they were doing the same work as the operators. Also, EM Trainees worked in close proximity to her and she observed them and spoke to them about their duties. (See R&R at p. 5) Ms. Milton further testified that “the SCA position is in the procurement goods and services division of the Procurement Department which is represented by Local 631.” (R&R at p. 5).

One of the Engineering Management Trainees, Chiedo Ohanyerenwa, was assigned to the Department of Engineering and Technical Services for the first nine (9) months of his training. He testified that he performed “lots of different tasks to get a feel for what everyone [was] doing in the department...and reviewed monthly reports prepared by the manager of the department to ‘get a feel for what she was doing as a manager’. [He stated that he] wasn’t responsible for performing the work of an engineer *per se*, but [he was to] get an idea of what was being done in the department... He had some supervisory responsibilities as an EM Trainee, but [did] not handle time and attendance, evaluations, raises, or discipline. He...is involved with policy in that he created an operating procedure for getting data from the new supervisory control and data acquisition system... [and] when he completes the two year program...he must pass a national certification examination. He will then be promoted to the position of assistant program manager and will be assigned to manage various projects at WASA.” (R&R at pgs. 4-5).

Aaron Montgomery, an EM Trainee, already had obtained his certification and was to be placed in a supervisory position upon completion of his training. (See R&R at p. 6). He testified that he received annual leave and sick leave, but he did not receive retirement benefits. (See R&R at p. 6) During his EM training “he went out with crews to ‘get exposed’ to the work they did, and had no supervisory responsibilities. He did not write any policies or regulations... [P]art of his duties...were to oversee contractors and represent WASA at meetings... [H]e supervised one inspector...in terms of giving him assignments, but was not responsible for discipline or performance evaluations.... He said that Mr. Gilmore is in charge of the EM training

program and meets with trainees monthly, and is a liaison between the trainees and managers.” (R&R at pgs. 6-7)

The Hearing Examiner noted that Corey Maddox, Carlett Bradley, Leon Michael, and Marvin Belt had advanced from Trainee I to the Trainee II position. Regarding the duties of the Trainee I position, they testified that a Trainee I spends most of his or her time in classes and observing operators performing their duties. (See R&R at p. 7). Trainee I employees did not perform any job duties performed by the operators, but they observed them performing their duties. (See R&R at p. 7). Trainee I employees received no annual or sick leave, retirement benefits or health insurance. (See R&R at p. 7). Mr. Terry Gilmore was their immediate supervisor, and he completed their performance evaluations when they served as a Trainee I. (See R&R at p. 7). The Trainee I employees do begin receiving annual leave, sick leave, health benefits and retirement benefits until they become a Trainee II. (See R&R at p. 7).

WASA asserted that Terry Gilmore, Training and Development Manager, Human Resources Department, had the ultimate responsibility for supervising and evaluating all the trainees. (See R&R at p. 8). Mr. Gilmore testified that the trainees spend between 60% and 70% of their time in the classroom, and the remainder of the trainees' time is spent in the field for on-the-job training. Also, the trainees are rotated on shifts. Mr. Gilmore testified that he observes all Trainee I employees because they have not yet obtained the certification necessary to perform the duties of a wastewater treatment operator. (See R&R at p. 8). He stated that “[c]ertification is a prerequisite to performing these duties. At the end of the first year, the Trainee Is take an examination to receive Level 1 certification ... [and] become[] a Trainee II, and a member of the bargaining unit. After two years of additional training, the Trainee II can be certified and become a ‘full-fledged wastewater treatment operator.’” (R&R at pgs. 8-9), Mr. Gilmore further stated that EM Trainees are college graduates with engineering degrees who learn to become supervisors and are given some supervisory experience. (See R&R at p. 9). At the end of the program, they become assistant program managers and supervise employees and contractors. (See R&R at p. 9).

Teresa Scott, WASA Acting Procurement Director, testified concerning the duties of the Senior Contract Administrator. She stated that the SCAs supervise contract specialists. They complete performance evaluations, review time and attendance information, impose discipline, and oversee the work of individuals who are under their supervision. They also prepare the interim and annual performance reviews for contract specialists and develop negotiation strategies used in negotiating with contractors. (See R&R at p. 9).

WASA maintained that the SCA is a supervisory position; the EM Trainees perform some managerial and supervisory duties while in training; and the Trainee I and II positions are in the classroom or observing in the field, but do not perform the duties of an operator. (See R&R at p. 8). Therefore, WASA contended that the three (3) positions should be excluded from the bargaining unit.

Citing *Committee of Interns and Residents and D.C. General Hospital*, 37 DCR 737, Slip Op. No. 237, PERB Case No. 89-R-02 (1989), the Hearing Examiner noted that “the Board has identified supervision, skills and benefits as significant factors that it examines to determine if employees share a community of interest. [She stated that] [i]n this matter, the evidence did not establish that Trainee Is and current bargaining unit members have commonality in those areas.” (R&R at p. 11). The Hearing Examiner found that Trainee I employees are supervised by Mr. Gilmore and, therefore, they have different supervision from the operators. Trainee I employees cannot perform the duties of an operator because they have no certification. The Hearing Examiner found that “Trainee I [employees] spend a significant amount of time in the classroom and learn skills in the classroom and in the field to become a Trainee II.... [W]hen they become a Trainee II, they become part of the bargaining unit.” (R&R at p. 12).

Regarding the Engineering Management Trainees, the Hearing Examiner determined that “the EM Trainee position was properly excluded from the bargaining unit.” (R&R at p. 13). She found that they do not perform the same duties as engineers, do not share the same supervisor as the other bargaining unit employees, and they are learn skills to manage and supervise the other employees. (See R&R at p. 13) The Hearing Examiner also determined that the Senior Contract Administrator is a supervisory position and was properly excluded from the bargaining unit.

In sum, the Hearing Examiner found that “there was sufficient evidence presented to establish that the EM Trainee and SCA positions are supervisory or managerial in nature, and, therefore, they cannot be part of the existing unit. Finally, [the Hearing Examiner determined that] the evidence did not support the conclusion that placing these positions in the current bargaining unit would promote ‘effective labor relations and efficacy of agency operations’ pursuant to ... [D.C. Code § 1-617.09(a).” (R&R at p. 14).

### **III. AFGE’s Exceptions and WASA’s Opposition**

AFGE does not take exception to the Hearing Examiner’s finding that the Senior Contract Administrator position is properly excluded from the bargaining unit.

AFGE takes exception to the Hearing Examiner’s finding that Mr. Gilmore performs the evaluations of Trainee I employees, stating that the evaluation is based on the reports Mr. Gilmore receives from the foremen, who supervise the trainees. (See Exceptions at p. 2). AFGE contends that the “fact that employees may attend classroom training and [that] Mr. Gilmore writes an evaluation based upon the observations of the actual supervisors would not be sufficient to exclude the employees from the bargaining unit.” (Exceptions p. 7). Also, AFGE cites testimony that the trainees receive 10 to 16 weeks of training during a two-year period and that Trainee I Carlett Bradley spent ninety percent of his time in the field. AFGE asserts that the Trainee I position “functioned under the supervision of the foreman in the Wastewater Division ... [that] the trainees rotate in a 24-hour shift and must comply with all WASA rules and regulations [as do bargaining unit employees].” (Exceptions at pgs. 6-7).

AFGE further asserts that managers and supervisors informed Union President Barbara Milton that the Engineering Management Trainees did not supervise anyone. AFGE asserts that the "EM Trainees may act as team leaders but do not supervise employees and have no authority to sign off on projects. (See Exceptions at p. 3). AFGE states that EM Trainee Cheido Ohanyerenwa "assisted project managers, who were engineers, on their projects." AFGE contends that the Project managers did not supervise WASA employees, but outside contractors. (See Exceptions at p. 3). Mr. Ohanyerenwa does not discipline employees and is not assigned work by Mr. Gilmore, because Mr. Gilmore is not an engineer. (See Exceptions at p. 4). Aaron Montgomery, another Engineering Management trainee, testified that he received his daily assignments from managers or supervisors in the division. He did not supervise WASA employees and had no retirement benefits as a trainee. (See Exceptions at p. 4). Mr. Montgomery further testified that as part of the training, the trainees must pass the Engineer-in-Training exam, which is a national test that is required in order to be certified as an engineer. (See Exceptions at p. 4).

Relying on *NLRB v. Yeshiva University*, 444 U.S. 672, 683 (1980), AFGE states that "[m]anagerial employees have been defined as individuals who represent management interests, by taking actions that effectively control or implement management policy, and formulate and effectuate policy by making operative decisions of the employer." *Doctor's Council of D.C. General Hospital and D.C. General Hospital Commission*, 31 DCR 2301, Slip Op. No. 77, PERB Case No. 83-RC-11 (1984). AFGE claims that "the Engineering Management Trainee did not take actions controlling or implementing management policy or formulating or effectuating policy. Mr. Gilmore testified that they have no supervisory authority and may not sign off on WASA projects." (Exceptions at p. 8). AFGE argues that the NLRB has held that "employees functioning as project leaders, exercising discretionary and independent judgment and carrying out assigned project functions, were not managerial employees who should be excluded from a bargaining unit." *General Dynamics Corp., Convair Aerospace Division and National Engineers and Professionals Association*, 213 NLRB 851, 857-859 (1974).

WASA counters in its Opposition that the Hearing Examiner's findings regarding the Trainee I and the EM Trainee positions are supported by the evidence on record. WASA points out that the Hearing Examiner did not make her determination based on a finding that the positions were managerial positions, but on the fact that there is no community of interest with bargaining unit employees. WASA relies on the Hearing Examiner's findings that the EM Trainees have different duties, which are performed under significantly different conditions in various work locations, and they serve a very different function than employees in bargaining unit positions. (See Opposition at pgs. 5-6).

#### IV. Discussion

D.C. Code § 1-617.09 (2001) defines an appropriate unit as one which contains a community of interest, promotes effective labor relations and efficacy of agency operations, and excludes management officials and supervisors. Also, in considering whether there is a

community of interest with other employees, the Board considers factors such as skills, working conditions, common supervision, physical location, organization structure, distinctiveness of functions performed, and the existence of integrated work processes. See *Committee of Interns and Resident and D.C. General Hospital*, 37 DCR 737, Slip Op. No. 237, PERB Case No. 89-R-02 (1989).

### **Trainee I and EM Trainees**

The Board has previously addressed the issue of supervisory and managerial employees. In *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635, PERB Case No. 99-U-04 (2000), the Board concluded that seven (7) Senior Financial Analysts were managers because they: (1) worked in different sections of the department and had different duties and responsibilities; (2) had considerable independence to make, or effectively recommend, budgetary decisions; and (3) were thus aligned with management. (See *id.* at p. 10). The Board finds that the Trainee I and Engineering Management Trainee positions do not meet the Board's criteria for finding they are closely aligned with management. They do not currently have considerable independence to make, or effectively recommend, actions that effectively control or implement management policy, and/or formulate and effectuate policy by making operative decisions of the employer.

Nonetheless, the Board finds that Trainee I employees have a different supervisor from the operators in the Wastewater Treatment Department, and they do not receive any employee benefits. A Trainee I has assigned duties which include observing or practicing the duties of bargaining unit operators. Their other duties pertain to classroom training. Furthermore, a Trainee I is not a permanent employee. A Trainee I must earn a Class I certification before becoming a bargaining unit Trainee II and receiving employee benefits. A Trainee I has no expectation of continued employment without obtaining a Class I certification. The operators currently in the bargaining unit obtained certification to perform the work of an operator, perform operator duties only, and receive employee benefits. The Hearing Examiner determined that the Trainee I position does not share a community of interest with the employees currently in the bargaining unit, and that it would not promote effective labor relations or efficacy of agency operations to include the Trainee I position in the current bargaining unit. The Board adopts the Hearing Examiner's findings and recommendation that the Trainee I position has no community of interest with the bargaining unit employees and, therefore, must be excluded from the bargaining unit.

With regard to the Engineering Management Trainees, some, but not all, of the EM Trainees formulate some policy, supervise outside contractors, or sometimes represent management in meetings. The Hearing Examiner found that the managerial aspect of the training program for EM Trainees is more significant than the engineering aspect. (See R&R at p. 6). The Hearing Examiner determined that "there was sufficient evidence presented to establish that the EM Trainee ... [position] [is] supervisory or managerial in nature, and therefore cannot be part of the existing unit." (R&R at p. 14).

The Board notes that a management official is "one who formulates and effectuates management policies by expressing and making operative the decisions of their employers." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). The Board has adopted this test, stating that this test is "critical to finding that a position should receive status as a management official." *AFGE, Local 2725 and D.C. Department of Housing and Community Development*, [45 DCR 2049, Slip Op. No. 532 at p. 4, PERB Case No. 97-UC-01 (1998)]. The Board finds that this test has not been met regarding the EM Trainees.

In considering whether there is a community of interest with other employees, the Board looks at factors such as supervision, skills, and benefits. The Board finds that the EM Trainees do not have the same benefits or share the same supervision as bargaining unit employees. They are at-will employees. EM Trainees have duties and responsibilities that are different, beyond the duties of other employees in five departments. Their duties are designed to gain knowledge of the work performed by bargaining unit employees and to train EM Trainees in the management aspect of that work. Even when they perform the same or similar duties as bargaining unit employees, there is a distinctiveness of functions. They are learning skills to become managers. The Board finds that the EM Trainees do not share a community of interest with the bargaining unit employees and, therefore, they should be excluded from the bargaining unit.

The Board adopts the Hearing Examiner's recommendation that the EM Trainee position is excluded from the bargaining unit, and accepts her findings and recommendations to the extent that they are consistent with our analysis and discussion.

### **Senior Contract Administrator (SCA)**

As stated earlier, a management official is "one who formulates and effectuates management policies by expressing and making operative the decisions of their employers." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). The Board has adopted this test, stating that it is "critical to finding that a position should receive status as a management official." *AFGE, Local 2725 and D.C. Department of Housing and Community Development*, [45 DCR 2049, Slip Op. No. 532 at p. 4, PERB Case No. 97-UC-01 (1998)]. Here, the SCA employee "[a]dministers the larger and/or more complex procurements, and provides guidance and direction to lower level contract specialists.... [The SCA] [e]valuates, formulates and effectuates the procurement policies of the [agency].... Directs work of Contract Specialists assigned to assist with larger, more complex procurements.... [The SCA employee] develops the [agency's] negotiation position and leads negotiations with contractors...." (R&R at p. 5). The Board finds that the employees in the Senior Contract Administrator position are individuals who represent management interests, take actions that effectively control or implement management policy, and formulate and effectuate policy by making operative decisions of the employer. Therefore, the Board concludes that the SCA position is properly excluded from the bargaining unit as a managerial position.



**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Unit Clarification Petition filed by the American Federation of Government Employee, Local 631, is hereby denied.
2. The Trainee I, Engineering Management Trainee and Senior Contract Administrator positions are excluded from the bargaining unit for the reasons set forth in this Decision and Order.

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

August 5, 2011

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 08-UC-01 was transmitted via Fax and U.S. Mail to the following parties on this the 5<sup>th</sup> day of August 2011.

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