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**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
Public Employee Relations Board**

In the Matter of:	)	
	)	
National Association of	)	
Government Employees,	)	
Local R3-06,	)	
	)	
Complainant,	)	
	)	PERB Case No. 99-U-04
v.	)	
	)	Opinion No. 635
D.C. water and Sewer	)	
Authority,	)	
	)	
Respondent.	)	

**DECISION AND ORDER**

This case involves an unfair labor practice complaint filed by the National Association of Government Employees, Local R3-06 (NAGE), alleging that the District of Columbia Water and Sewer Authority (WASA) violated D.C. Code §1-618.4(a)(1), (2), (3) and (5). Specifically, NAGE asserts that WASA committed unfair labor practice violations by: (a) refusing to bargain on request on the impact and implementation of new performance ratings, a reorganization, and reapplication procedures; (b) failing to select four bargaining unit employees, including two newly-elected officers of the local, for continuing employment in WASA's financial operations; (c) transferring six bargaining unit employees to temporary positions; and (d) placing bargaining unit employees in positions improperly classified by WASA as non-bargaining unit positions. NAGE also alleges that the collective bargaining agreement requires negotiations, upon request, over the impact and implementation of managerial decisions, including proposed reductions-in-force.

In its answer to the complaint, and in a motion to dismiss the complaint, WASA claims that under the terms of Section 152 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) and Section 142 of the District of Columbia Appropriations Act of 1997, the District of Columbia Chief Financial Officer (DC-CFO) and, by delegation, WASA's Chief

Financial Officer (WASA-CFO), is under no obligation to bargain regarding the organization, evaluation, selection, or removal of financial, budget, or accounting personnel. In addition, WASA contends that the Public Employee Relations Board (PERB or Board) has no jurisdiction to apply the Comprehensive Merit Personnel Act (CMPA) to the WASA-CFO's actions.<sup>1/</sup> WASA further moved to dismiss the complaint on the ground that the Board has consistently ruled that alleged contract violations do not constitute unfair labor practices and that the Board lacks jurisdiction over such disputes. The Hearing Examiner denied WASA's motion to dismiss on both asserted grounds. As a result, six days of hearings were held.

The Hearing Examiner issued a Report and Recommendation (R&R). Both NAGE and WASA filed exceptions to certain parts of the R&R. The Hearing Examiner's R&R and the parties' exceptions are before the Board for disposition.

#### **I. Background:**

WASA was established as an independent agency in 1996. It assumed, among other things, the functions previously performed by the Water and Sewer Utility Administration (WASUA), D. C. Department of Public Works. WASUA's employees, including those represented by NAGE, Local R3-06, in the Office of the Controller (PERB Certification No. 76 (1994)), were transferred to WASA when it became operational in October 1996. WASA's Board of Directors appointed a new General Manager, and directed him to employ a Chief Financial Officer (WASA-CFO) to replace the Controller. The new WASA-CFO began work in July 1997. On November 6, 1997, through a memorandum of understanding (MOU), the DC-CFO delegated certain authorities to, and imposed certain obligations on, the WASA Board of Directors, with provisions for redelegation to the WASA General Manager and the WASA-CFO. Among the requirements noted in the MOU, were that the WASA-CFO develop minimum qualifications and performance standards for positions on his staff; and that he execute performance contracts with WASA financial employees.

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<sup>1/</sup> Section 152 of the OCRAA provides, in pertinent part, that "[n]otwithstanding any other provisions of law...all of the executive branch accounting, budget and financial management personnel, shall be appointed by, and serve at the pleasure of, and act under the direction and control of the Chief Financial Officer...." Section 142 of the 1997 D. C. Appropriations Act made the DC-CFO the statutory employer of accounting, budget, and financial management employees of independent agencies, including WASA. The DC-CFO delegated his authority over WASA's personnel to WASA through a Memorandum of Understanding dated November 6, 1997.

On July 20, 1998, the WASA-CFO submitted a plan for reorganization of his office to the DC-CFO. The plan included a reduction in the number of positions in the office and the assumption by the office of considerably more responsibility. The increase in responsibilities was in the area of rate-setting, debt management, and financial planning.<sup>2/</sup> The job title Budget Analyst was eliminated, and Financial Analyst (FA) and Senior Financial Analyst (SFA) titles were added. The WASA-CFO informed employees in his office that he would recruit to fill jobs in the reorganized office between July and September 1998. Current employees not offered employment in the office through such recruitment would be offered other WASA positions (possibly at lower grades), or given the option of early retirement (if eligible) or a severance package.

Several meetings and exchanges of correspondence between NAGE and WASA took place. NAGE demanded to bargain over the implementation of new performance rating procedures and the plan to reinterview employees of the WASA-CFO's office for their positions. The General Manager replied that under Section 152 of the OCRAA, financial employees of the DC-CFO (and, by delegation under the MOU, the financial employees of the WASA-CFO), are "at will" employees. In addition, the General Manager noted that the courts have held that Section 152 of the OCRAA overrides any provision of law or contract that is inconsistent with the exercise of that "at will" authority.<sup>3/</sup> WASA went ahead with the reorganization in October 1998. A number of employees were selected for jobs in the reorganized WASA-CFO's office; others were placed elsewhere in WASA; a few were eventually separated from service. WASA also classified several positions in the new WASA-CFO's office as supervisory, managerial, or confidential, and excluded them from the bargaining unit.

As a result of WASA's actions, NAGE filed the above-described unfair labor practice complaint. WASA filed an answer. Subsequently, the matter was referred to a Hearing Examiner.

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<sup>2/</sup> The plan called for a reduction in the number of employees from 65 budgeted positions (of which some 35 were actually filled) to a total of 40 positions. (Tr. 1065)

<sup>3/</sup> See, District Council 20, AFSCME v. The District of Columbia, C. A. No. 97-185 (D.D.C., 1997, affirmed insofar as relevant, without published opinion, AFSCME v. District of Columbia, No. 97-7146, D. C. Cir., 1998), and Leonard v. District of Columbia, No. 96-9962 (D.C.S.C., 1997).

## **II. The Hearing Examiner's Report and Recommendations and NAGE and WASA Exceptions:**

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified five issues for resolution. These issues, her findings and recommendations, and the parties exceptions, are as follows:

1. *Notwithstanding Section 152 of the OCRAA, is WASA bound by the bargaining obligations of the CMPA, with respect to its financial employees? Also, does PERB have jurisdiction to determine alleged violations of the duty to bargain with respect to those employees?*

WASA argued that it has no obligation to bargain over decisions affecting its financial employees. WASA bases its argument on OCRAA, Section 152, quoted supra, and court decisions in District Council 20, American Federation of State, County and Municipal Employees v. The District of Columbia (AFSCME v. DC), C.A. No. 97-185 (D.D.C. 1997), aff'd insofar as relevant, without published opinion, AFSCME v. DC, No. 97-7146, D.C. Cir. (May 14, 1998, and Leonard v. District of Columbia, No. 96-9962 (D.C. Super Ct. 1997). These two cases held that Section 152 converted represented District of Columbia financial employees into "at will" employees, terminable without regard to just cause requirements and procedural protections afforded Career Service employees by D.C. Code Sec. 1-617.

The Hearing Examiner relying on the Board's decisions in AFSCME, District Council 20, Local 1200 and D. C. Office of the Controller, Division of Management, 46 DCR 461, Slip Op. No. 503, PERB Case No. 96-UC-01 (1996) and AFSCME, District Council 20, Local 1200 v. District of Columbia and Anthony Williams, Chief Financial Officer, 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A(1999), found that the WASA-CFO's status as an at-will employer, did not relieve him of all bargaining obligations imposed under the Comprehensive Merit Personnel Act (CMPA). As a result, she concluded that the Board has jurisdiction to determine whether the alleged violations of these obligations had occurred. Specifically, the Hearing Examiner determined that, except for matters directly relating to the termination of financial employees, WASA remains subject to the bargaining obligations of the CMPA. In addition, she concluded that the Board has jurisdiction to determine whether WASA has complied with these obligations.

Neither NAGE nor WASA took exception to the Hearing Examiner's finding on this issue. After reviewing the pleadings and the record, we conclude that the Hearing Examiner's finding is based on, and consistent with, the Board's previous rulings on the effect of Section 152 of the

OCRAA.<sup>4/</sup> In view of the above, we adopt the Hearing Examiner's finding.

The extent of WASA's residual bargaining obligations are discussed below.

*2. Are the alleged unlawful acts violations of the parties' collective bargaining agreement, over which PERB lacks jurisdiction?*

In its answer and motion to dismiss, WASA asserted that the alleged unfair labor practices are, in fact, violations of the parties' collective bargaining agreement (CBA) over which the Board lacks jurisdiction. The Hearing Examiner issued a decision on April 16, 1999, denying WASA's motion to dismiss the unfair labor practice complaint on the cited grounds. WASA did not address this issue in its post-hearing brief, and the Hearing Examiner concluded that the discussion on pages 6 and 7 of her earlier decision covered the issue. In that decision, the Hearing Examiner noted that the Board has held that reiteration of statutory obligations in a collective bargaining agreement, does not constitute a waiver of the underlying statutory obligations or elimination of the Board's jurisdiction. See, IBPO, Local 446 v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06, (1992). The Hearing Examiner found that the issues in the instant case, are essentially statutory in nature, particularly the question of whether Section 152 of the OCRAA preempts the bargaining obligations of the CMPA. Neither party took exception to this finding.

We find that the Hearing Examiner's denial of WASA's motion to dismiss the complaint, is consistent with Board precedent and the CMPA. She correctly notes that certain allegations in the complaint, such as the impact of Section 152 of the OCRAA on WASA's bargaining obligations and PERB's jurisdiction, are not proper subjects for grievances concerning contract interpretation; and that the reiteration in the collective bargaining agreement of statutory obligations does not, *per se*, waive the underlying statutory obligations. See, IBPO, Local 446 v. DCGH, supra. We believe that the Hearing Examiner's finding is reasonable and supported by Board precedent. In view of the above, we adopt the Hearing Examiner's finding.

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<sup>4/</sup> In AFSCME, District 20, the Board held that the OCRAA preempted the CMPA only to the extent there is a direct conflict between the two statutes. A motion for reconsideration of this decision was denied, 46 DCR 116, Slip Op. No. 508 (1997); the final Decision and Order was issued on January 26, 1998, 45 DCR 2054, Slip Op. No. 533. The DC-CFO filed a petition for review of PERB's jurisdictional determination in the District of Columbia Superior Court, which remains undecided.

3. *Did NAGE make a timely request to bargain over the impact and implementation of the reorganization of WASA's financial operations, and are the standards and procedures for selecting employees for positions in the reorganized office elements of such impact and implementation bargaining?*

The Board has held that management need not bargain over rights reserved by Section 1-618.8 of the CMPA. However, when a union makes a timely request, management must bargain over the impact and effects on employees of a reserved (management) decision. Moreover, management violates its statutory duty to bargain when it implements a management decision in the face of a timely union request to bargain over impact and effect. See, American Federation of Government Employees, Local 383 v. D.C. Department of Human Services, Slip Op. No. 418, PERB Case No. 94-U-09 (1995); IBPO, Local 446 v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1992). In addition, the Board has determined that the duty to bargain "extends to matters addressing the impact and effect of management actions on bargaining unit employees as well as procedures concerning how these rights are exercised." Teamsters, Local 639 and District of Columbia Public Schools, 38 DCR 6693, Slip Op. No. 263 at p.2, PERB Case No. 90-N-02 (1990); AFSCME, Council 20 and District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). In view of the above, the question concerning whether there has been a timely request for impact and effect bargaining, is often an issue of fact.

The Hearing Examiner noted that the exchanges which took place between the parties after the WASA-CFO announced that he intended to reorganize his office, could be characterized by a lack of clarity on the part of NAGE, and a lack of understanding of the developments in the WASA-CFO's office by WASA's General Manager. Notwithstanding the lack of clarity in NAGE's demands for negotiations over the reorganization, the Hearing Examiner concluded that, under Board precedent, even a broad, general request for bargaining "implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable." International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322 at pgs. 3-4, PERB Case No. 91-U-14 (1992). Therefore, the Hearing Examiner concluded that, NAGE's request to bargain was sufficient to trigger "WASA's obligation to bargain over the impact and effect of its decision before implementing its reserved decision." (R&R at p. 23).

Having concluded that NAGE made a sufficient and timely request for bargaining on the impact and effects of the reorganization, the Hearing Examiner determined that there remained a question concerning the scope of WASA's duty to bargain. The Hearing Examiner noted that NAGE's bargaining interests were clearer at the end of the hearing and briefing phase of the proceeding, than they had been when the reorganization began and NAGE made its bargaining demands. NAGE's actual complaint, the Hearing Examiner concluded, was that WASA

undertook and completed the process of selecting employees for the reorganized office without bargaining about: (1) the qualifications for the new positions; (2) who would conduct the interviews; and (3) what questions would be asked. Based on previous Board decisions, the Hearing Examiner found that in the instant case, the qualifications for the new positions were an integral or "substantive" part of WASA's decision as to how it will utilize its employees to perform WASA's work. (R&R at p. 25.). As a result, the Hearing Examiner determined that WASA need not bargain over those qualifications. See, Teamsters, Locals Nos. 639 and 730 and District of Columbia Public Schools, 38 DCR 2483, Slip Op. No. 273, PERB Case No. 91-N-01, (1992); and IBPO, Local 446 v. DCGH, supra.

Furthermore, the Hearing Examiner notes that the more difficult question to be addressed is whether the "procedures" for evaluating employee applicants - who would do the interviewing and what questions would be asked - are the kind of "procedures" over which WASA must bargain. The Hearing Examiner recognized that matters such as who would conduct interviews and what questions might be asked, fall into the category of "procedures" over which WASA would ordinarily be required to bargain. However, in the special circumstances of this case, the Hearing Examiner concluded that bargaining over such matters would "impermissibly trench" on the WASA-CFO's ability to reform a dysfunctional organization.<sup>5/</sup> (R&R at p. 25). Similarly, the Hearing Examiner found that matters such as "layoff" and "callback" procedures, are normally negotiable items in connection with a reduction-in-force. Nonetheless, the Hearing Examiner found that "the defining characteristic of an at-will employer is his authority to discharge employees, summarily and without explanation or review, and [] any asserted bargaining rights that directly limit WASA's right to do so are preempted by [the] OCRAA." (R&R at p.26). In short, the Hearing Examiner determined that these procedures are integrally related to the exercise of the "at-will" authority. As a result, the Hearing Examiner concluded that WASA had no obligation to bargain over these procedures.

The Hearing Examiner found, with respect to matters such as training, severance pay, administrative leave, and job placement, that WASA was obligated to bargain over those matters, whether or not NAGE made specific proposals. (R&R at p. 26). Therefore, WASA's failure to do so was a violation of D.C. Code Sec. §1-618.4(a)(1), (3) and (5).

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<sup>5/</sup> Specifically, the Hearing Examiner determined that in the instant case, "bargaining over the questions to be asked of applicants for the newly created positions and over how the interviews were to be conducted would impermissibly trench on the exercise of [the WASA-CFO's] judgement as to how a dysfunctional organization could be reformed, and how to identify individuals who were qualified to perform the new functions." (R&R at p.25)

Neither party took exception to the Hearing Examiner's findings on this issue. However, as discussed below, NAGE took exception to the Hearing Examiner's decision not to recommend a *status quo ante* remedy for the violation.

Consistent with the above, we find that the Hearing Examiner's findings are reasonable and supported by the record and Board precedent. As a result, we adopt these findings.

4. *Did WASA improperly classify 14 financial employees as statutorily excluded managerial, supervisory, or confidential employees?*<sup>6/</sup>

NAGE alleges that "[o]n or about October 8, 1998, the agency selected several bargaining unit employees for positions termed 'nonbargaining unit'." (Comp. at par. 14). The Hearing Examiner noted that the parties' disagreed over fourteen employees who were classified as statutorily excluded from the bargaining unit.

In the instant case, neither party filed a unit clarification petition concerning the exclusion of certain employees from the bargaining unit. However, NAGE raised the issue of the propriety of WASA's actions in effecting these exclusions. As a result, the Hearing Examiner asserted that she had jurisdiction to consider this question.<sup>7/</sup> We find that the Hearing Examiner properly asserted jurisdiction in this regard.

In her report, the Hearing Examiner notes that during the hearing the parties stipulated that: (1) Senior Financial Analyst (SFA) Sandra Collins is a manager and supervisor; (2) SFA Gail Alexander Reeves is a confidential and supervisory employee; and (3) Deborah Cole, Paul Bender's executive secretary, is a confidential employee. In addition, in its post-hearing brief, NAGE agreed that SFA Michelle Cowan was properly classified as a manager and Vonda Summers as a confidential employee. Also, she points out that NAGE's brief did not challenge WASA's contention that Senior Accountant Anthony Thorne is properly excluded as a managerial, supervisory and/or confidential employee. As a result, the Hearing Examiner concluded that Mr. Thorne was properly excluded from the bargaining unit on one or more of the claimed bases. (R&R at p. 28.). However, the parties disagree as to seven Senior Financial Analysts, and two Financial Analysts. They further disagree as to four Utility Accountants.

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<sup>6/</sup> The parties originally disputed a larger number of employees. However, some of these disagreements were resolved during the hearing or in the post-hearing briefs.

<sup>7/</sup> We note that the parties agreed during the hearing that the instant matter, is in part, a unit clarification as provided by Board Rule 506. (Tr. 886)

The Hearing Examiner found that in its post hearing brief, WASA raised for the first time, that the position of Lead Teller (occupied by D. Williams), should be excluded as a supervisory position. In addition, WASA asserts for the first time, that a Utility Accountant (Jacqueline Harper), should be excluded from the bargaining unit as a supervisor as well as a manager. Since the evidentiary record had already closed, the Hearing Examiner dismissed these claims. WASA did not take exception to this finding.

As noted above, the Hearing Examiner denied WASA's request that the Lead Teller and Utility Accountant positions be excluded from the bargaining unit. The Hearing Examiner based her denial on the fact that WASA made its request after the record was closed. In Elliot v. D. C. Department of Corrections, 43 DCR 2940, Slip Op. No. 455, PERB Case No. 95-U-09, (1995), the Complainant filed objections to the Hearing Examiner's findings and conclusions. The Complainant did not file objections to specific findings. Instead, the Complainant claimed that there were errors in his testimony which was made before the Hearing Examiner. We denied the Complainant's (Elliot) request that the "Board reconsider the findings and conclusion of the Hearing Examiner based on submitted written testimony contained in his objection." Id. Slip Op at p. 2. The Board noted that "once [a record] is closed we will deny any request to reopen. . .absent [a] compelling reason. Permitting the submission of post-hearing evidence by the Complainant would unfairly prejudice the Respondent by denying it an opportunity to cross-examine..." Id.

In the instant case, WASA does not contend that they were denied an opportunity to present evidence before the record was closed. Instead, WASA argues that it was only after hearing the testimony of a witness (Hunt), that it realized that the positions occupied by Williams and Harper were supervisory positions. Furthermore, WASA asserts that NAGE did not call Williams or recall Harper in order to rebut the witness' (Hunt) testimony. The Hearing Examiner concluded that:

[t]o the extent that those employees function as supervisors, it is because they are authorized to do so by WASA. [Furthermore,] before the hearing record was closed, it may have been open to allow WASA to amend its claim on the basis of Hunt's testimony, and thus put NAGE on notice. [However, once the record was closed, WASA could not amend its claim.] (R&R at p. 28).

In view of the above, the Hearing Examiner determined that the position of Lead Teller (Doris Williams) and Utility Accountant (Jacqueline Harper), could not be excluded as supervisory positions. (R&R at p. 28). The Hearing Examiner's finding is reasonable and consistent with our holding in Elliot. As a result, we conclude that the Hearing Examiner's denial of WASA's request was proper since WASA failed to amend its claim while the record was open.

In addition, WASA has not presented any compelling reason for reopening the record. Moreover, we note that the Hearing Examiner's ruling does not preclude WASA from filing a unit clarification petition in the future with respect to these employees. See note 9, *infra*. In light of the above, we adopt the Hearing Examiner's findings.

With respect to the seven Senior Financial Analysts (SFA), the Hearing Examiner concluded that they were all properly excluded from the bargaining unit as managers. (R&R at p. 38.) The seven work in different divisions and sections of the WASA-CFO's office, and have different duties and responsibilities. However, the Hearing Examiner found that all of them have considerable independence to make, or effectively recommend, budgetary decisions, and are thus "aligned with management", a standard applied by the Supreme Court in NLRB v. Yeshiva University, 444 US 672 (1979). As discussed, below, NAGE took exception to this finding. Specifically, NAGE argues that the duties performed by employees in the WASA-CFO's office have not significantly changed since the 1994 certification of NAGE as the exclusive representative of the employees.

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). This Board has adopted this test and said 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, *supra*, Slip Op. No. 532 at pgs. 4-5.

In addition, the NLRB accords managerial status to employees "who formulate, determine and effectuate an employer's policies" and those who are "aligned with management." See, NLRB v. Yeshiva University, 444 U.S. 672, 682 (1979). "Although the...[NLRB] has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management's interests by taking or recommending discretionary action that effectively control or implement employer policy." *Id.* at 683. The "specific job title of the employees involved is not itself controlling. Rather, the question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority and relationship to management." Bell Aerospace, *supra*, 416 U.S. at 290, n 19,

NAGE asserts that the testimony concerning the duties of several of the incumbents who occupy these disputed positions, dealt with "expectations rather than history", and is thus speculative in nature. (NAGE's Exceptions, unnumbered p. 2). Furthermore, NAGE notes that: (1) the exclusions were effected by WASA without PERB's review and approval; and (2) no employee in the WASA-CFO's office has authority to make policy for the office. We conclude that none of these arguments are sufficient to overcome the Hearing Examiner's conclusions.

We note that changes in the bargaining unit status of individual employees may change

from time to time even if the overall responsibilities of the office in which they work do not, and the employing agency may reclassify their bargaining unit status, consistent with the provisions of D.C.Code Sec. §1-618.9(b). However, such actions are subject to challenge by the union through a unit clarification petition. See, Board Rule 506.1. In the instant case, we believe that NAGE's argument represents a mere disagreement with the Hearing Examiner's conclusions concerning the duties performed by the employees. As a result, we conclude that NAGE has not provided a basis for reversing or modifying the Hearing Examiner's conclusions.

Finally, NAGE's argument that no employee in the WASA-CFO's office has the authority to make policy for the office is probably correct, but irrelevant. In the instant case, the Hearing Examiner has correctly applied the principle that an employee who effectively recommends policy decisions to management, and whose duties are aligned with management, is properly excluded from the bargaining unit as a manager. Therefore, we believe that the Hearing Examiner's finding that the seven disputed SFA's were all properly classified as managers by WASA, is fully supported by the factual record and the application of PERB and NLRB precedents. In view of the above, we adopt the Hearing Examiner's finding with respect to the seven SFA's.

Also, the Hearing Examiner determined that none of the four Utility Accountants have responsibilities that rise to the level of managerial status, as claimed by WASA.<sup>8/</sup> WASA did not take exception to this finding concerning these Utility Accountants. We believe that this finding is reasonable and supported by the record. As a result, we adopt the Hearing Examiner's finding.

The Hearing Examiner also determined that one Financial Analyst (L. Taylor) was improperly excluded from the bargaining unit as confidential. She found that while Taylor may have access to information he is obliged to keep confidential, such access is insufficient, under Board precedent, to make him a confidential employee under the CMPA. Relying on the Board's decision in AFGE, Local 2725 and D. C. Department of Housing and Community Development, supra, the Hearing Examiner did not find that Taylor has the sort of involvement in, or access to, information concerning labor relations or collective bargaining policy that would create a conflict of interest by virtue of his bargaining unit status. As a result, the Hearing Examiner determined that Financial Analyst Taylor, was not a confidential employee, and thus not properly excluded from the bargaining unit.

WASA filed an exception to the Hearing Examiner's finding. WASA's exception is based on its contention that "[t]he record establishes that Mr. Taylor...serves as a [:(1)] management confidant with respect to proposed termination and promotion decisions prepared

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<sup>8/</sup> As noted above, the Hearing Examiner dismissed WASA's claim that one of the FA's, J. Harper, was a supervisor.

by the Personnel Department[;] and [(2)] consultant to management in the deliberative stages of budgeting personnel reclassifications and reorganizations" (WASA's Exception, at p. 5)

The Board has determined that an employee is "properly excluded as confidential when his or her confidential role is 'sufficiently involved in labor relations and policy formation matters.'" AFGE, Local 2725 and D.C. Department of Housing and Community Development, supra, Slip Op. at p.3.

To the extent that WASA's arguments are factual in nature, they represent a mere disagreement with the Hearing Examiner's factual conclusions, and do not present a basis for reversing or modifying those conclusions. Moreover, we have said that, "[c]hallenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings." Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02. (1998). Also, see American Federation of Government Employees, Local 872 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-01, 89-U-16, 89-U-18 and 90-U-04 (1991).

However, if we assume that WASA's arguments are based on the application of Board precedent to the facts in the instant case, there analysis represents a misunderstanding or misinterpretation of the Board's case law. Specifically, in AFGE, Local 2725 and D.C. DHCD, supra, the Board held that with respect to a confidential employee, "[t]he controlling factor is whether the employee's relationship to labor relations policy and collective bargaining matters would create, between management and the union, a conflict of interest for the incumbent of the position at issue. A duty to refrain from divulging information that does not otherwise give rise to such conflict is not, standing alone, sufficient." (Slip Op. at p. 3). See also, AFGE, Local 12 and Department of Employment Services and AFSCME, 28DCR 3943, BLR Case No. 0R006, Op. No. 14 (1981); and AFGE, Local 2978 and Department of Human Services, 36 DCR 8207, Slip Op. No. 236, PERB Case No. 89-R-04, (1989).

In the instant case, the Hearing Examiner found that while Taylor has access to proposed personnel actions for bargaining unit employees, he plays no role in formulating the decisions to take those actions. As a result, the Hearing Examiner concluded that, Taylor does not play a role in management deliberations concerning any labor relations or collective bargaining matters. We conclude that this finding is reasonable and is supported by Board precedent. Therefore, we adopt this finding.

WASA did not state the basis for its exclusion of a second Financial Analyst (B. Jones). The Hearing Examiner found no evidence that Jones was a supervisor, manager, or confidential employee, and thus concluded that there was no basis for her exclusion from the bargaining unit. WASA did not take exception to this finding. We adopt this finding.

With respect to the remaining employees, whose exclusion from the bargaining unit was objected to by NAGE, the Hearing Examiner noted that several of these employees had been hired after the reorganization (in some cases after the complaint had been filed), and were therefore not covered by the complaint. We believe that this finding is supported by the record. As a result, we adopt this finding.

5. *Was WASA's implementation of the reorganization of its financial operations, without bargaining with NAGE, motivated by anti-union animus?*

The Hearing Examiner found no evidence of disparate treatment of union and non-union employees, and no credible evidence that WASA's actions were motivated by antiunion animus, intended to undercut the union, or punish employees for union activities. Instead, she concluded that WASA's refusal to bargain with NAGE was motivated by a misinterpretation of the implications of Section 152 of the OCRAA on its bargaining obligations, and not by anti-union animus. (R&R at p. 36, n. 72.). Specifically, she determined that, except for the testimony of one union witness, there was no evidence in the record to support a conclusion that the implementation of the reorganization, including the placement of union members and officers in positions in the reorganized office and the termination of other union members, was motivated by anti-union animus.<sup>9/</sup> She noted, for example, that all union members who applied for new positions were interviewed, and that most fared well during the selection, including two employees who were local union officers. In addition, the Hearing Examiner determined that there was evidence that, two union employees who were not selected, "had not performed well, [or] in any event were perceived as not performing well, and [ there was] no evidence that their Union status in any way influenced the selection decision." (R&R at p. 14). NAGE did not take exception to this finding.

D.C. Code Sec. 1-618.4(a)(3), provides that it shall be an unfair labor practice for the District to discriminate "in regard to hiring or tenure of employment ...to... discourage membership in any labor organization. . . ." To establish a violation of Section 1-618.4(a)(3), the complainant must make a *prima facie* showing sufficient to support the inference that protected

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<sup>9/</sup> The Hearing Examiner determined that the union member who testified was not a credible witness. (R&R at p. 14) We note that issues of fact concerning the probative value of evidence and credibility resolution are reserved to the Hearing Examiner. See, e.g., University of 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 Bagenenstone, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34(1991).

conduct was a motivating factor in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity. See, District of Columbia Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-02(1999) and NLRB v. Aquatech, Inc., 926 F.2d 538,540 (1991).

In the instant case, the Hearing Examiner determined that NAGE failed to establish that protested union activity was a motivating factor in any of WASA's selection decisions. (R&R at pgs 13-14) A review of the record reveals that the Hearing Examiner's determination is reasonable, consistent with case law and is supported by evidence. Therefore, we adopt the Hearing Examiner's finding.

### III. Remedy

Since we have adopted the Hearing Examiner's findings that WASA violated the CMPA, we now turn to the issue of what is the proper remedy in this case.

NAGE asks that a *status quo ante* remedy be imposed, including reinstatement of employees who were terminated. In addition, NAGE is requesting that employees who were placed in temporary positions, be returned to their original positions. While the Hearing Examiner found that WASA committed an unfair labor practice by failing to bargain with NAGE concerning certain aspects of the impact and implementation of the reorganization, she did not find that NAGE had argued, or even produced evidence, that any employee was disadvantaged by the absence of bargaining. In addition, the Hearing Examiner concluded that WASA did not act out of anti-union animus and that, strict legal requirements aside, NAGE bore some practical responsibility for the absence of bargaining.

In view of the above, the Hearing Examiner did not recommend a *status quo ante* remedy. Instead, she recommended that WASA be directed to cease and desist in the future from failing to bargain on matters on which it retains the obligation to bargain. The Hearing Examiner noted that in the instant case, a *status quo ante* remedy: (1) would create chaos in an already troubled agency; and (2) could disadvantage union members who were promoted as a result of the reorganization. In addition, the Hearing Examiner concluded that PERB lacks jurisdiction to order the reinstatement of those employees who were terminated as a result of the exercise of WASA-CFO's "at-will" authority. NAGE takes exception to the Hearing Examiner's decision not to recommend a *status quo ante* remedy, arguing that this "simply excused [WASA's] violation and advises the Agency to avoid breaking the law in the future" (NAGE's Exceptions, unnumbered page 4).

The Board has the authority to impose *status quo ante* remedies for a respondent's failure to bargain in good faith (D.C. Code Secs. 1-605.2(3) and 1-618.13(a)), and we have done so in

the past. While the Board has used this to both remedy the effects of the failure to bargain and to impress on an offending party the importance of fulfilling their bargaining obligations -- particularly where the offenses are seen as egregious -- we have not always done so.

In AFGE, Local 872 and D. C. Department of Public Works, Slip Op. No. 439, PERB Case Nos. 94-U-02 and 94-U-08, (1995), the Board found that restoration of the *status quo ante* was inappropriate. The Board's ruling in AFGE, was based on the fact that: (1) the agency's bargaining obligations attached only to the impact and implementation of a reduction-in-force (RIF); (2) there was no evidence that bargaining would have affected the RIF; and (3) the rescission of the RIF would disrupt and impair the agency's operations. The Board noted "that it weighs all of the above factors in determining the appropriateness of such relief, when the duty to bargain is limited to impact and effects". Slip Op. at n.3.

In the instant case, we believe that in light of the inextricable relationship between WASA's actions and its "at-will" employment authority (with respect to financial employees), a *status quo ante* remedy would be difficult, and in the case of employees who were actually terminated impossible, to achieve.<sup>10</sup> Also, we note that WASA's failure to bargain concerns only impact and effects bargaining. As a result, we do not believe that bargaining would have affected the reorganization.

Furthermore, the Hearing Examiner determined that WASA's refusal to bargain with NAGE was motivated by a misinterpretation of the implications of Section 152 of the OCRAA on its bargaining obligations, and not by anti-union animus. As discussed above, we adopted this finding. Therefore, we do not believe that the violation in this case justifies a *status quo ante* remedy.

Finally, WASA's unlawful refusal to bargain covered limited issues, and we do not believe that on the facts presented, those failures to bargain would justify an order to restore the status quo.

We recognize that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief

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<sup>10/</sup> With respect to employees who were terminated, a *status quo ante* remedy, may not be consistent with Section 152 of the OCRAA. See, District Council 20, AFSCME v. The District of Columbia, C. A. No. 97-185 (D.D.C., 1997, affirmed insofar as relevant, without published opinion, AFSCME v. District of Columbia, No. 97-7146, D. C. Cir., 1998), and Leonard v. District of Columbia, No. 96-9962 (D.C.S.C., 1997).

afforded under the CMPA for unfair labor practices, is the protection of rights and obligations. Although we are denying NAGE's request for a *status quo ante* remedy, we are requiring that WASA post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of WASA's conduct, and thereby affected by it, would know that WASA has been directed to comply with their bargaining obligations under the CMPA. In light of the above, we believe that the Hearing Examiner's suggested remedy is appropriate. Thus, we adopt the Hearing Examiner's recommended remedy.

The Hearing Examiner also recommended that, as a remedy for WASA's improper classification of six employees as non-bargaining unit, WASA be directed to place them back in the bargaining unit. In addition, she recommended that WASA reimburse NAGE for dues that were not withheld and paid over to NAGE, with respect to any of these six employees. The reimbursement shall cover the period from October 12, 1998 (the date withholding ceased) until the date that bargaining unit status is restored.<sup>11/</sup>

As discussed above, we adopted the Hearing examiner's findings that WASA violated D.C. Code Sec. 1-618.4 (a)(1), (2) and (3) by unilaterally placing six bargaining unit employees in positions incorrectly designated as "nonbargaining unit." Although we concluded that, in doing so, WASA was not motivated by anti-union animus, the result was to deprive NAGE of the dues to which it was entitled.<sup>12/</sup> As a result, NAGE suffered a loss by its inability to collect dues from the existing employees. In the ordinary course, dues come out of an employee's pocket, not WASA's, but in this case, it is WASA, not the employees, that caused the Union's loss. Furthermore, the affected employees are not individual parties to this proceeding, and in any event, as a matter of fairness, we do not believe that they now should be ordered to reimburse the Union for lost dues. As a result, we find that WASA should reimburse NAGE for dues not withheld and paid over to NAGE, with respect to any of the six improperly classified employees. The reimbursement shall cover the period from October 12, 1998 (the date withholding ceased) until the date that bargaining units status is restored.

who had authorized withholding as of October 12, 1998. The reimbursement must cover the period from October 12, 1998 (the date withholding ceased) until the date the bargaining unit status is restored

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<sup>11/</sup> These six individuals had authorized withholding as of October 12, 1998 (the date of the reorganization).

<sup>12/</sup> Pursuant to D.C. Code § 1-618.7, NAGE as certified exclusive representative, was entitled to have dues deducted and collected by the employer from the salaries of those employees who authorize the deduction. Also, under Article 48 of the collective bargaining agreement, WASA agreed to deduct Union dues from employees paychecks, when authorized to do so by the affected employee. In addition, WASA agreed to transmit the deducted dues to the Union.

The Hearing Examiner found that there was no evidence which showed that any of the six excluded employees, had been adversely affected by their exclusion from union representation during this period. As a result, she did not recommend any additional remedial action. Neither party took exception to this recommendation. We believe that this finding is reasonable and supported by the record. Therefore, we adopt this finding

Pursuant to D.C. Code Sec. 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's findings and conclusion that WASA: (a) violated D.C. Code Sec. 1-618.4(a)(1), (3), and (5) by failing to bargain on request as to certain impact and effects of and procedures for implementing the reorganization of its financial operations; and (b) violated D.C. Code Sec. 1-618.4(a)(1), (2) and (3) by unilaterally placing six bargaining unit employees in positions incorrectly designated as nonbargaining unit. We also adopt the Hearing Examiner's recommended relief, including an Order directing the WASA to reimburse NAGE for dues not withheld and paid over to NAGE with respect to six employees who were improperly excluded from the bargaining unit.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from violating D.C. Code § 1-618.4(a)(1), (3) and (5) by refusing to bargain on request with the National Association of Government Employees, Local R3-06 (NAGE) as to certain impact and effects of decisions reserved to management by the CMPA.
2. WASA its agents and representatives shall cease and desist from violating D.C. Code § 1-618.4(a)(1), (2) and (3) by unilaterally placing bargaining unit employees in positions incorrectly designated as outside the bargaining unit.
3. WASA shall immediately classify Lemuel Taylor, Bertha Jones, Mary Richardson, Brenda Robinson, Jacqueline Harper and Susette Stones as bargaining unit employees.
4. WASA shall reimburse NAGE for dues that were not withheld and paid over to NAGE, with respect to the six employees noted in paragraph 3, who had authorized withholding as of October 12, 1998. The reimbursement shall cover the period from October 12, 1998 (the date withholding ceased) until the date that bargaining unit status is restored.

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5. WASA shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices to employees are normally posted.
6. WASA shall notify the Public Employee Relations Board (PERB), in writing within fourteen (14) days from the date of this Order that the Notice has been posted accordingly and as to the steps it has taken to comply with the directives in paragraph 3, 4, and 5 of this Order.
7. Pursuant to Board Rule 559.1, and for purposes of D.C. Code § 1-618.13(c), this Decision and Order is effective and final upon issuance.

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

August 8, 2000



Public  
Employee  
Relations  
Board

Government of the  
District of Columbia



717 14<sup>th</sup> Street, NW, 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 (WASA), 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. 635, PERB CASE NO. 99-U-04 (August 8, 2000)**

**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 § 1-618.4(a)(1), (2), (3) and (5) by the acts and conduct set forth in Slip Opinion No. 635.

**WE WILL** cease and desist from unilaterally implementing changes in terms and conditions of employment without first notifying and, if requested, bargaining with the exclusive bargaining representative of affected bargaining unit employees.

**WE WILL** cease and desist from unilaterally placing bargaining unit employees in positions incorrectly designated as non-bargaining unit.

**WE WILL** cease and desist from failing to meet our bargaining obligations under the Comprehensive Merit Personnel Act (CMPA) by denouncing or otherwise refusing to recognize the National Association of Government Employees, Local R3-06 (hereinafter "NAGE" or "Complainant") as the exclusive bargaining representatives of bargaining unit employees placed under our authority and for whom the Complainant is the certified representative.

**WE WILL** recognize NAGE as the exclusive bargaining representative of all bargaining unit employees, as defined in their respective bargaining unit description, that were placed under the authority of WASA's Chief Financial Officer.

**WE WILL** bargain collectively in good faith with NAGE over any change in established and negotiable working conditions of all bargaining unit employees placed under the authority of WASA's Chief Financial Officer.

**WE WILL NOT**, in all like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Water and Sewer  
Authority

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