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**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
American Federation of Government Employees, Local 872,	)	
	)	
Complainant,	)	PERB Case No. 05-U-21
	)	
v.	)	Opinion No. 891
	)	
District of Columbia Water and Sewer Authority,	)	
	)	
Respondent.	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case**

The American Federation of Government Employees, Local 872 ("Complainant", "Union" or "Local 872") filed an unfair labor practice complaint ("Complaint") against the District of Columbia Water and Sewer Authority ("Respondent", "Agency" or "WASA"). The Complainant asserts that WASA violated D.C. Code 617.04(a)(1) and (5), by instituting a protocol for visiting employee and management personnel and refusing to allow union officers "to properly engage in their representational duties on behalf of their members." (Complaint at p. 5).

The Respondent filed an Answer denying the allegations and asserting that the Complaint failed to state a claim under the Comprehensive Merit Personnel Act ("CMPA") and requesting that the Complaint be dismissed.

A hearing was held in this matter. In the Report and Recommendation ("R&R"), the Hearing Examiner concluded that the Respondent did not violate the CMPA. No exceptions were filed. The Hearing Examiner's R&R is before the Board for disposition.

## II. Background

The Union represents WASA employees who are located at one of four sites: Bryant Street, First Street, Blue Plains and Reno Road. By letter dated November 3, 2005, Stephen Cook, WASA's Labor Relations Manager, notified the Union of a new policy for visitors to WASA sites. The letter states in pertinent part:

**"Protocol for Visiting Employees and Management Personnel"**

I have been advised that Union Officials are visiting work areas where they are not employed to see employees and managers without prior notification to management personnel. These unannounced visits by Union Officials can adversely affect the operations of the work area visited. While the Authority acknowledges the Unions' right to meet with managers and bargaining unit employees, all efforts should be made to minimize the impact on the Authority's operations.

In an effort to meet the needs of both the Unions and the Authority, if there is need to speak to employees outside of your work area Officials must call the appropriate supervisor and request to meet with the employee or employees so it can be scheduled in a way to accommodate the needs of both the Union and the operations of the Department. If you need to meet with management personnel outside of your work area you are expected to call the manager and schedule the meeting in advance.

The Union claims that the Respondent committed an unfair labor practice by issuing the Protocol and implementing it on December 3, 2004. Prior to the Protocol, Union officials never telephoned supervisors in advance. In the past, consistent with the collective bargaining agreement ("CBA"), a Union official would go to the site where the bargaining unit employee worked, and then notify the supervisor so the supervisor could determine if the employee was available. For example, a Union representative would report to the First Street facility, show his/her badge to the security guard, and be granted entry on the 11<sup>th</sup> floor by Ms. Necechea Minor, the secretary to the Director. Ms. Minor would then advise the employee's supervisor that the union representative wanted to meet with a particular employee. If the supervisor conveyed that the employee was not available at that time, the union representative would schedule another time for the meeting. (See R&R at pgs. 5-6).

On December 3, 2004, Christopher Hawthorne, then President of Local 872, responded to a telephone call from bargaining unit member Tonya Childress who was assigned to the 11<sup>th</sup> floor at the First Street location. Ms. Childress was to meet with her supervisor and did not know the reason for the meeting. The employee took her cell phone to the meeting and Mr. Hawthorne listened when Ms. Childress was advised that the meeting was part of an investigation that could result in her

termination. At that point, Ms. Childress asked for representation and was given an hour to obtain representation. Mr. Hawthorne asked two union officials, Jonathan Shanks and Howard Coles, to assist Ms. Childress. (R&R at p. 6). Mr. Shanks and Mr. Coles arrived at the First Street site and informed Ms. Minor that they were there to represent a union member. When Ms. Minor learned that they did not have an appointment, she stated that they would have to leave the premises. Another WASA Manager then approached and also told them that without an appointment they would have to leave. At that point, the security guard arrived and was instructed by the Manager to contact the police. However, Ms. Childress informed the Union representatives that "she was all right" and they left the premises. (See R&R at pgs. 7-8).

As a result of WASA's implementation of the new Protocol, the Union filed the Complaint in this matter. Before the Hearing Examiner, the Union asserted that the procedure established by the Protocol "interferes with its right to represent members because it requires Union officials to make a scheduled appointment" (R&R at p. 5) and "interfere[s] with access to members." (R&R at p. 7). The Union further argued that the Protocol conflicts with the past practice of the parties.

WASA countered that management has the obligation to ensure the efficient running of its operations and maintained that the Protocol increases efficiency and minimizes disruption. Mr. Cook testified that he issued the Protocol because Union officials appeared at WASA offices without an appointment. He stated that the Protocol complies with the CBA and with WASA's current security system. Anyone who is not employed by WASA must have permission to enter a WASA building.<sup>1</sup> Mr. Cook testified that the Protocol recognizes the Union's right to meet with management and bargaining unit members. There is a Union steward at each of the four WASA sites. These stewards are not governed by the Protocol. Only union officials who are traveling to another site are affected by the Protocol. (See R&R at p. 9). WASA maintains, therefore, that it did not violate the CBA or the CMPA by implementing the Protocol or by its actions on December 3.

## II. The Hearing Examiner's Report

The Hearing Examiner stated that the issue presented was "whether [WASA] committed an unfair labor practice by interfering with the Union's protected activities with bargaining unit members or by refusing to bargain collectively in good faith, when it issued the Protocol and/or when it implemented it on December 3." (R&R at p. 9).

The Hearing Examiner noted that pursuant to Board Rule 520.1, the Complainant has the burden of proving the allegations asserted in the complaint. This burden must be met by a preponderance of evidence. The Hearing Examiner first addressed the issue of whether the Protocol violated the CBA. The Hearing Examiner noted that even if there existed a violation of the CBA, a

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<sup>1</sup>At the hearing, Mr. Cook testified that he rescheduled the December 3 meeting with Ms. Childress when he was informed that she requested Union representation.

violation of the CBA does not by itself constitute an unfair labor practice. The Hearing Examiner cited *Fraternal Order of Police v. D.C. Metropolitan Police Department*, 46 DCR 7605, Slip Op. No. 384, PERB Case No. 94-U-23 (1999), where the FOP alleged that MPD violated the CBA by establishing a voluntary action plan to ensure compliance with existing requirements regarding the use of seat belts in police vehicles. In *FOP v. MPD*, the Board dismissed FOP's complaint and held that "taking all of the allegations as true, the Complaint [did] not give rise to any unfair labor practices or other claim under the CMPA within the Board's jurisdiction." (Slip Op. No. 384 at p. 2). The Hearing Examiner next addressed whether implementation of the Protocol on December 3 constituted an unfair labor practice in violation of the CMPA.

"The Union argue[d] that the Protocol conflicted with a past practice. [The Hearing Examiner indicated that] [t]he party arguing that a past practice exists must present evidence that establishes the 'clarity, consistency and acceptability' of longstanding conduct. *Harbison-Walker Refractories*, 114 LA 1302, 1305 (2000)." (R&R at p. 12). The Hearing Examiner found that such evidence was not presented. She noted that the "Complainant presented evidence of its practice, but the language in the Protocol, i.e., that management had become aware of the Union's practice of visiting sites without prior notification, indicates that there was no clarity to the practice and certainly no acceptance by management." (R&R at p. 12).

Article 7, Section B of the parties' CBA requires Union officials to obtain permission from the supervisor of a bargaining unit member before meeting with that member. The Hearing Examiner noted that the Protocol requires Union officials to make such a request of the supervisor *in advance*, if the Union officials do not work at the same WASA site as the employee. Thus, the Hearing Examiner determined that the Protocol was consistent with the parties' CBA. Furthermore, the Hearing Examiner noted that, here, the security measures were required for all persons entering WASA facilities except employees assigned to the same site. She found no evidence that Union officials were treated differently than anyone else entering a site from the outside.<sup>2</sup> (See R&R at p. 12).

The Hearing Examiner also considered WASA's argument that the Protocol was implemented because on-site visits by Union representatives without prior notice were disruptive and inefficient at times. In fact, Union officials presented evidence that sometimes when they arrived to meet an employee, they had to reschedule the meeting because the employee was not available. She determined that unannounced visits are disruptive to the Agency's operations, inefficient, take the time of management, and cost the Agency, which was paying the wages of the Union officials while

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<sup>2</sup>Citing *St. Luke's Memorial Hospital, Inc. and Annette Aboral de Infirmaries and Empleados de la Salud*, 2004 NLRB LEXIS 510 (2004), where that Board held that it could not conclude that an unfair labor practice was committed by the employer, absent evidence that organizations (other than the union) were permitted to enter the employer's facility without the advance notice required of the union. (R&R at p. 12).

they were on Union business during their tours. The Hearing Examiner stated that the objective of maximizing efficiency is a management right established in the CMPA and the Master Agreement.<sup>3</sup> (See R&R at pgs. 10-11).

“After reviewing the language of the Protocol and the requirements of the Master Agreement and CMPA, the Hearing Examiner conclude[d] that the Protocol as stated does not violate the CMPA. It does not require the Union official to explain the reason for the visit. It does not give *carte blanche* to the Agency to control access by the Union, but rather it provides that the meeting should be scheduled to accommodate both parties.” (R&R at pgs. 10-11). Furthermore, in the only incident cited by the Union after the implementation of the Protocol, the Hearing Examiner noted that the Union officials “did not attempt to contact Ms. Childress’ supervisor in advance but reported directly to the site. [They] did not follow procedures and did not leave when instructed.” (R&R at p. 12). Thus, she determined that the Union did not meet its burden of proof that WASA violated the CMPA on December 3, when it refused to permit Union officials who had not followed the Protocol to meet with a bargaining unit member. The Hearing Examiner concluded that WASA did not violate D.C. Code § 1-617.04(a) (1) and (5). In view of this she recommended that this matter be dismissed. No exceptions were filed.

Pursuant to Board Rule 520.11, “the party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.” In the present case, the Hearing Examiner found insufficient evidence to establish that WASA’s actions violated the CMPA. After reviewing the record, we agree that the Complainant has not met its burden of proof in this matter.

Pursuant to D.C. Code § 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, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner’s findings and conclusions that WASA did not violate D.C. Code § 1-617.04(a)(1) and (5) by implementing a Protocol for all visitors entering its facilities and its application of the Protocol on December 3. In light of the above, the Complaint must be dismissed.

### ORDER

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

1. The Complaint filed by the American Federation of Government Employees, Local 872 is hereby dismissed.

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<sup>3</sup>Citing *Teamsters, Local Unions No. 639 and 730 v. District of Columbia Public Schools*, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).

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2. Pursuant to Board Rule 559.1 this decision is final upon issuance.

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

June 20, 2007

**CERTIFICATE OF SERVICE**  
**CORRECTED**

This is to certify that the attached Decision and Order in PERB Case No. 05-U-21 was transmitted via Fax and U.S. Mail to the following parties on this the 20<sup>th</sup> day of June 2007.

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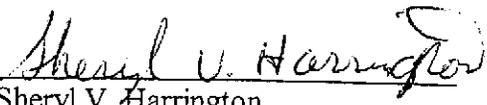
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