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

In the Matter of)
D.C. Water and Sewer Authority,)
Petitioner,) PERB Case No. 03-UM-03
v.) Opinion No. 751
American Federation of State, County and)
Municipal Employees, Local 2091, American)
Federation of Government Employees, Locals 631,)
872 and 2553, and National Association of)
Government Employees, Local R3-06,)
Respondents.)

DECISION AND ORDER

I. Statement of the Case:

On August 15, 2003, the District of Columbia Water and Sewer Authority (“WASA”), filed a “Petition for Modification of Bargaining Units” with the Public Employee Relations Board (“Board” or “PERB”). The Petition seeks to consolidate the five existing non-compensation units at WASA, into one non-compensation unit.

This matter was referred to a Hearing Examiner. At a pre-hearing conference the unions asserted that the Board does not have the authority to consolidate bargaining units unless they are represented by the same labor organization. In addition, the unions argued that the modification which is being sought by WASA is contrary to public policy. In view of the above, the unions requested that the Hearing Examiner dismiss the Petition. On March 29, 2004, the Hearing Examiner denied the unions’ motion to dismiss. In addition, the Hearing Examiner informed the parties that a hearing would be scheduled to consider the merits of the Petition. The American Federation of State, County and Municipal Employees (“AFSCME”), the American Federation of Government Employees (“AFGE”) and the National Association of Government Employees (NAGE) have each filed an interlocutory appeal concerning the Hearing Examiner’s denial of the unions’ motion to dismiss.

WASA has filed an opposition to the unions' request for interlocutory appeal. The unions' request for an interlocutory appeal and WASA's opposition are before the Board for disposition.

II. Discussion:

Pursuant to Board Rule 504.1,¹ WASA filed a "Petition for Modification of Bargaining Units." In their Petition WASA is seeking to consolidate the five existing non-compensation units at WASA, into one non-compensation unit.

At a January 29, 2004, pre-hearing conference the five unions asserted that PERB does not have the authority to consolidate bargaining units unless they are represented by the same labor organization. In addition, the unions argued that the modification which is being sought by WASA is contrary to public policy. In view of the above, the unions requested that the Hearing Examiner dismiss the Petition. At the January 29th pre-hearing conference, the parties and the Hearing Examiner agreed that "further proceedings would be held in abeyance until PERB has an opportunity to rule on any exception by either Petitioner or Respondents to [the Hearing Examiner's] ruling on the motion to dismiss." (Hearing Examiner's Ruling on the Motion to Dismiss at p. 4).

¹Board Rule 504.1 provides as follows:

- 504.1 A petition for unit modification of either a compensation or non-compensation unit may be filed by a labor organization, by an employing agency or jointly. A unit modification may be sought for any of the following purposes:
- (a) To reflect a change in the identity or statutory authority of the employing agency;
 - (b) To add to an existing unit unrepresented classifications or employee positions created since the recognition or certification of the exclusive representative;
 - (c) To delete classifications no longer in existence or which, by virtue of changed circumstances, are no longer appropriate to the established unit; or
 - (d) To consolidate two (2) or more bargaining units within an agency that are represented by the same labor organization.

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On March 29, 2004, the Hearing Examiner denied the unions' motion to dismiss. In addition, the Hearing Examiner informed the parties that a hearing would be scheduled to consider the merits of the Petition. Specifically, in his decision the Hearing Examiner notes the following:

Respondents', argument that PERB has authority to consolidate units only when the affected units are represented by the same labor organization is without merit. PERB Rule 504.1(d) is derived from DCC §1-617.09(c) which provides as follows:

Two or more units for which the labor organization holds exclusive recognition within an agency may be consolidated into a single larger unit if the Board determines the larger unit to be appropriate. The Board shall certify the labor organization as the exclusive representative in the new unit when the unit is found appropriate.

This subsection establishes the principle that *if* a labor organization represents two or more units and asks PERB to consolidate them; and *if* PERB determines the consolidated unit to be "appropriate", *then* PERB is without choice and "*shall* certify, the labor organization as the exclusive representative" of the consolidated unit (emphasis supplied). This unique situation does not preclude consolidation of bargaining units under other circumstances, in which other interests and considerations will come into play. PERB does have the authority to grant the primary relief sought by Petitioner. PERB clearly has authority to grant the alternative relief sought by Petitioner under PERB Rules 504.1(b) and (c).

The threshold issue raised in ¶16 of the Petition is whether the five existing bargaining units represented by Respondents are appropriate at the present time. Whether the events that have occurred since establishment of the Agency in 1996 (including the unit modifications approved by PERB in 1997) are such that the current bargaining units are no longer appropriate and, if so, whether a single consolidated unit is the only appropriate unit (Petitioner's preferred outcome) or if modifications should be made in accordance with PERB Rule 504.1(b) and (c), are questions that can be answered only after the development of a factual record through a hearing.
(Hearing Examiner's Ruling on the Motion to Dismiss at pgs. 3-4).

Also, the Hearing Examiner acknowledged that he initially agreed with the parties' request to hold this matter in abeyance until the Board had an opportunity to rule on the unions' exceptions to his ruling. However, after reviewing the Board's Rules he concluded that such a course of action is prohibited by Board Rule 554.1. As a result, the Hearing Examiner determined that he would not hold this matter in abeyance. Instead, he informed the parties that he would proceed with a hearing in order to consider the merits of WASA's Petition.

The unions disagree with the Hearing Examiner's ruling on the motion to dismiss and believe that they should be allowed to file an interlocutory appeal concerning the Hearing Examiner's ruling on the motion to dismiss.

Board Rule 554.1 provides as follows:

Unless expressly authorized by the Board, interlocutory appeals to the Board of rulings by the Executive Director, Hearing Examiner or other Board agents shall not be permitted. Exceptions to such rulings shall be considered by the Board when it examines the full record of the proceedings.

It is clear from the language contained in Board Rule 554.1, that the Board will: (1) not allow interlocutory appeals unless expressly authorized by the Board and (2) consider a party's exception to a ruling when it examines the full record of the proceeding. In light of the express language of Board Rule 554.1, AFSCME asserts that in the present case, the Board should authorize the parties to file interlocutory appeals. Specifically, AFSCME contends that "WASA's Petition raises legal questions that are of significant magnitude, both as precedent and as they bear on the proceedings in the instant case. [Furthermore, AFSCME claims that] the parties agreed that they are issues that require the PERB's consideration immediately." (AFSCME's Request at p. 4). As a result, AFSCME is requesting that PERB grant their request and authorize its review of the Hearing Examiner's ruling.

AFGE is also seeking permission to file exceptions to the Hearing Examiner's ruling on the motion to dismiss. AFGE asserts that the Hearing Examiner's ruling is contrary to the Comprehensive Merit Personnel Act. In addition, AFGE claims that the present case "presents exceptional circumstances which merit review by [either the Executive Director or] the Board, prior to a hearing being conducted in this matter." (AFGE's Submission at p. 3). In their submission, NAGE asserts that it concurs with AFSCME's and AFGE's position.

WASA filed an opposition to all of the pleadings filed by the unions. In their opposition, WASA asserts that the Hearing Examiner's ruling is correct. In addition, WASA claims that Board Rule 554.1 expressly prohibits interlocutory appeals. Finally, WASA contends that the unions' appeal are an effort to delay the proceeding.

After reviewing the pleadings, we have determined that the unions have not made a persuasive argument to justify the Board taking the extraordinary step of allowing the unions' request for interlocutory appeal. Therefore, we deny the unions' request for interlocutory appeal. However, we would like to point out that once the Hearing Examiner issues his Report and Recommendation in this matter, all of the parties will have an opportunity to file exceptions to the Hearing Examiner's findings. As a result, all of the parties will still have the opportunity to challenge this and any other

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ruling at the end of the proceeding.

For the reasons discussed, we deny the unions' request for interlocutory appeal.

ORDER

IT IS HEREBY ORDERED THAT:

1. The unions' request for interlocutory appeal is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

May 26, 2004