

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:	)	
	)	
<b>International Federation of Professional and Technical Engineers, AFL-CIO</b>	)	
	)	
<b><i>Petitioner,</i></b>	)	
	)	
and	)	<b>PERB Case No. 12-RC-03</b>
	)	
<b>District of Columbia Office of Administrative Hearings,</b>	)	
	)	
<b><i>Respondent.</i></b>	)	
	)	

**HEARING EXAMINER'S REPORT AND RECOMMENDATIONS**

**PROCEDURAL BACKGROUND**

This representation case arises from the International Federation of Professional and Technical Engineers, AFL-CIO (IFPTE or Union or Petitioner) July 27, 2012 *Recognition Petition (Petition)*, PERB Case No. 10-U-37, seeking recognition as the exclusive representative for the compensation and/or noncompensation unit, as determined by District of Columbia Public Employee Relation Board (PERB or Board) for a bargaining unit of all administrative law judges in the District of Columbia Office of Administrative Hearings (OAH or Employer or Respondent) (IFPTE and OAH are referred to collectively as the Parties).<sup>1</sup>

IFPTE seeks to represent for collective bargaining purposes pursuant to D.C. Code § 1-617.01, *et seq.*, all Administrative Law Judges (ALJs) appointed pursuant to D.C. Code §§ 2-1831.06 and 2-1831.08, excluding all management officials, supervisors, confidential employees, employees engaged in personnel work other than in a purely clerical capacity, and employees engaged in administering the provisions of Title XVII of the District of

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<sup>1</sup> The record contains three *Petitions* as follows: the *Recognition Petition* (July 27, 2012); an *Amended Petition* (September 27, 2012); and a *Second Amended Petition* (September 28, 2012). There are no substantive differences among the petitions. For this reason, the Hearing Examiner will refer to IFPTE's three filings collectively as the *Petition*.

Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139 (CMPA).

On October 24, 2012, OAH filed *Respondent's Comments Regarding Recognition Petition (Respondent's Comments)* asserting in pertinent part that: all OAH ALJs are supervisors and managers; the statutes governing OAH render much of collective bargaining irrelevant; and the PERB cannot assert jurisdiction over the petition and force OAH to participate in a meaningless process. For these reasons, OAH urged PERB to dismiss the *Petition*.

On November 14 and 30, 2012, IFPTE filed *Petitioner's Response to Respondent's Demand for Formal Hearing and Comments Regarding Recognition Petition* asserting in response that: the *Petition* for an ALJ bargaining unit was appropriate; the claim that ALJs are supervisors and/or managers was incorrect; the ALJ classification and appointment do not affect their ability to bargain over wages and the full range of working conditions.<sup>2</sup> In addition, IFPTE opposed OAH's demand for a formal hearing and for a workplace ballot.

On March 26, 2013, the Executive Office of Mayor Vincent C. Gray (Mayor) filed a *Motion for Leave to File a Brief on Behalf of the Executive Office of Mayor Vincent C. Gray as Amicus Curiae (Amicus Curiae Motion)* with a *Brief of the Executive Office of Mayor Vincent C. Gray in Support of a Formal Hearing Regarding the Recognition Petition (Mayor's Brief)*. Briefly stated, in contradiction to the *Respondent's Comments*, the *Mayor's Brief* asserts: that the CMPA does not, as a matter of law, bar ALJ's from forming a union; ALJs at both the Federal and State levels have been successfully unionized; collective bargaining can address genuine issues between the ALJs and OAH. The *Mayor's Brief* argues in detail that the ALJs are not supervisors or management officials simply by virtue of their positions and that judicial ethics do not necessarily prohibit IFPTE's representation of the ALJs. The *Mayor's Brief* asserts that IFPTE's *Petition* merits a prompt hearing, not an automatic dismissal. At hearing, OAH opposed the *Amicus Curiae Motion* and the introduction into evidence of the *Mayor's Brief*.

On or about April 29, 2013, PERB scheduled a June 18, 2013 hearing in this case.<sup>3</sup>

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<sup>2</sup> The record contains two IFPTE filings with the same caption dated November 14 and 30, 2012. There are no substantive differences between the filings. For this reason, the Hearing Examiner has treated with the two filings as one.

<sup>3</sup> At the June 18, 2013 hearing, additional hearing days were set for June 21, 24 and 25, 2013.

On June 14, 2013, a conference call was held by the Hearing Examiner with Petitioner and Respondent's counsels to discuss hearing procedures. OAH counsel stated that OAH had motions to assert at the start of the hearing. The Hearing Examiner instructed both Parties that any motions would be dealt with as threshold matters at the hearing and, if possible, subject to bench rulings by the Hearing Examiner.

On June 17, 2013, OAH filed a written *Emergency Motion for Summary Judgment (Emergency Motion)* and a *Motion to Stay (Stay)*. The *Emergency Motion* reiterates the arguments of the *Respondent's Comments* and additionally requests a summary judgment dismissal of the *Petition* while the *Stay* requests a stay in the hearing until the summary judgment motion is resolved.

On June 18, 21, 24 and 25, 2013, a hearing was held at the PERB, Suite E630, 1100 4<sup>th</sup> Street, SW, Washington, DC. The Petitioner was represented by David Ricksecker, Esq. and Melissa L. Stewart, Esq., Woodley & McGillivray and Teresa Idris, Esq., General Counsel, IFPTE. The Respondent was represented by Kenneth S. Slaughter, Esq., Robert Ames, Esq. and Sandi Pessin Boyd, Esq. Venable LLP.

The Petitioner's witnesses were: Jesse Goode, OAH ALJ; Marilyn Zahm, Social Security Administration (SSA) ALJ; James C. Harmon, Jr., OAH ALJ; Steven M. Wellner, OAH Principal ALJ (PALJ); Shana Frost, DC Office of Attorney General (OAG) Attorney; Christopher Langford, Government Accountability Office (GOA) Analyst; Wanda R. Tucker, OAH ALJ; and Arabella W. Teal, OAH ALJ. The Respondent's witnesses were: Mark D. Poindexter, OAH Deputy Chief ALJ; Ann C. Yahner, OAH PALJ; John Dean, OAH PALJ; Steven M. Wellner, OAH PALJ. Petitioner's Exhibits (Px) 1, 3, 4, 5, 12, 14, 21, 22, 26, 27, 28, 31 and Respondent's Exhibits (Rx) 1, 2, 3, 4, 5, 6, 7, 8, 10, 10A, 11A, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 were accepted into the record. A transcript (Tr) was taken of the hearing.

The Parties were afforded a full opportunity: to present testimony, documents and other evidence; to examine and cross-examine witnesses; and to challenge documents and other evidence offered by the other Party. The Parties' agreed to file Post-hearing Briefs which were received on August 14, 2013. When the Hearing Examiner received the Parties' Post-hearing Briefs shortly thereafter from the PERB, the record closed. This Hearing Examiner's Report and Recommendation is based on the evidence and testimony presented by the Parties at hearing, the arguments in their Post-Hearing Briefs, the PERB Rules and the CMPA.

## THE MOTIONS

At the start of the hearing, the Hearing Examiner addressed admission of the *Amicus Curiae Motion*, the *Mayor's Brief*, and rulings on the *Emergency Motion* and the *Stay*. (Tr 34-41).

The Respondent opposed the *Amicus Curiae Motion* and the introduction of the *Mayor's Brief* on the grounds that the Mayor was not a party to this matter and had no standing to request for an expedited hearing or the *amicus curiae* submission. (Tr 23-26). The Respondent asserted as well that PERB did not permit *amicus curiae* submission. In support of its position, the Respondent cited PERB Opinion 326 in which the PERB rejected *amicus curiae* submissions from two labor organizations because the organizations had no standing. The Respondent asserted that based on this PERB Opinion, *amicus curiae* submissions were not accepted by the PERB because the Mayor was a non-party. (Tr 34).

The Petitioner asserted that the *Amicus Curiae Motion* and the *Mayor's Brief* should not be permitted into the record. The Petitioner argued that the Mayor's submissions were filed in March 2013, but never opposed until the hearing. Further, the Petitioner argued that the Mayor's submissions were distinguishable from the submissions described in Opinion 326. Petitioner noted that in Opinion 326 competing labor organizations sought to file *amicus curiae* briefs as interveners, when they should have intervened pursuant to the PERB's representation rules. (Tr 26-29).

After review and consideration of the arguments, the Hearing Examiner found that in Opinions 737 and 993 the PERB had accepted *amicus curiae* submissions. The Hearing Examiner found as well that, while *amicus curiae* submissions were rejected in Opinion 326, this did not establish that PERB rules did not permit *amicus curiae* submissions because the rejection was based on the failure of the competing labor organizations to follow the PERB's representation rules. The Hearing Examiner found as well that the Respondent's opposition to the *amicus curiae* submissions was arguably untimely. (Tr 36). In addition, the Hearing Officer noted that PERB rules do not prohibit *amicus curiae* submissions and that PERB Rule 502.11 requires a hearing which develops "a full and factual record upon which the Board may make a decision."

For these reasons, the Hearing Examiner granted the *Amicus Curiae Motion* and the *Mayor's Brief* was accepted into the record. (Tr 37).

Regarding the Respondent's *Stay* the Hearing Examiner found that this Respondent motion was inconsistent with the Respondent's statements during the Pre-hearing Conference and, contrary to the Respondent's assertions, a stay would increase costs for the Parties and the array of witnesses that had been assembled for hearing. (Tr 37-38). For these reasons, the Respondent's *Stay* was denied. (Tr 38).

Regarding Respondent's *Emergency Motion*, which is a motion for summary judgment, Respondent asserts that as a matter of law, the OAH ALJs cannot be in an appropriate unit pursuant to DC Code § 1-601, *et seq.* (CMPA). Respondent argues the OAH authorization statute, DC Code DC Code § 2-1831, *et seq.*, requires ALJs to serve as managers and supervisors and the CMPA not only prohibits a unit from being established including managers and supervisors, but also ALJs do not have the right to form, join and assist a labor organization and engage in collective bargaining because it would result in a conflict of interest or otherwise be incompatible with law or the ALJs' official duties and responsibilities.

Petitioner asserts an ALJ bargaining unit is appropriate and would promote effective labor relations and Agency efficiency. Petitioner argues that OAH has stipulated that the employees in the proposed ALJ bargaining unit share a community of interest. The open questions, Petitioner argues, are whether ALJs are supervisors or management officials and whether an ethical conflict forbids ALJs from organizing under the CMPA.

Summary judgment is appropriate to promptly and expeditiously dispose of a dispute without trial. Summary judgment is granted when there is no dispute as to the material facts and a party is entitled to judgment as a matter of law.

PERB Rules 502.10 and 502.11 provide that on the filing of a representation petition, the Board shall direct a preliminary investigation as it deems necessary including an informal hearing which is to be investigatory and not adversarial. The hearing is to develop a full and factual record on which the Board may make a decision.

Arguably, a summary judgment motion is not appropriate in an investigatory and non-adversarial hearing. Moreover, in this representation proceeding, the Hearing Examiner finds there are significant and material disputes between the Parties regarding the material facts. For these reasons, the Respondent's *Emergency Motion* is denied.

## STATEMENT OF THE CASE

### INTRODUCTION

PERB Rule 502.11 provides the hearing in this representation matter is informal, investigatory and non-adversarial. However, it is the Respondent who challenges the Petitioner's representation petition filing. For this reason, the analysis and discussion of the evidence and argument must start with the Respondent's challenges to the Petitioner's efforts to represent OAH ALJs for collective bargaining purposes.

OAH asserts that the Board must deny the IFPTE recognition petition. OAH opposes an ALJ collective bargaining unit represented by IFPTE for four reasons arguing as follows:

First, OAH argues that ALJs are statutorily prohibited from participating in a bargaining unit because the *Office of Administrative Hearings Establishment Act* (*Establishment Act*) requires them to serve as managers and supervisors. (DC Code § 2-1831, *et seq.*). (Despite passage by the Council in 2001, the *Establishment Act* became effective March 6, 2002).

Second, OAH argues that ALJs are barred from participating in a bargaining unit by the CMPA because they: serve on OAH management Committees; recommend hiring and firing of OAH employees which impacts personnel decisions, and (3) directly oversee the daily activities of OAH attorney advisors and other staff.

Third, OAH argues that ALJs are barred from participating in a bargaining unit because they are supervisors. Their duties and responsibilities satisfy at least five of the primary CMPA supervisory functions.

Fourth, OAH argues that ALJs are barred from participating in a bargaining unit because their participation would be ethically improper or create the appearance of impropriety violating the OAH Ethics Code and the CMPA, the *Establishment Act*, and ALJs official duties.

IFPTE asserts that the evidence and submissions support a finding that an ALJ bargaining unit is appropriate and would promote effective labor relations and OAH efficiency. The only questions remaining are: whether ALJs are supervisors or

management officials; and whether an ethical conflict forbids ALJs from organizing under the CMPA?

IFPTE argues that case law requires an employee's actual job duties and responsibilities at the time of the hearing control whether the employee is a supervisor or management official. IFPTE argues that ALJs' actual job duties involve no supervision or management responsibilities. Employees who support ALJ are supervised by other OAH managers, including the Chief, Deputy Chief, General Counsel, and Clerk of Court. The ALJs are neither supervisors nor management officials.

IFPTE argues that, while Respondent argues ALJs' participation in a Union creates a conflict of interest, union membership does not create a conflict of interest, and even if it did, any potential conflict could be avoided.

### **THE OFFICE OF ADMINISTRATIVE HEARINGS**

The material facts established by the evidence and testimony are as follows:

The DC City Council (Council) created the Office of Administrative Hearings (OAH) in 2001 to serve as an independent administrative court which "provide[s] centralized adjudication services for several District agencies" pursuant to the *Establishment Act*.

Relevant and material to the *Petition*, the *Establishment Act* states:

§ 2-1831.09. Powers, duties, and liability of Administrative Law Judges

(a) An Administrative Law Judge shall:

\* \* \*

(5) Fully participate in Office management committees and management activities to set and steer policies relating to Office operations, including, without limitation, personnel matters;

(6) Supervise, direct, and evaluate the work of employees assigned to him or her;

\* \* \*

Currently, 32 Administrative Law Judges (ALJ) sit on the OAH bench. The OAH agency head is Chief Administrative Law Judge Mary Oates Walker (Chief Judge). OAH has four functional departments: Judicial Corps; Office of General Counsel; Office of the Clerk of the Court; and Administrative Staff. (Px 1). IFPTE's representation petition seeks exclusive recognition for the ALJs, who are all assigned to the Judicial Corps.

The record established that OAH's Chief Judge is the principal policy-maker and supervises and manages all OAH employees. (Tr 70, 85-86; Px 1; Px 3). Specific to the OAH ALJs, the Chief Judge assigns cases, monitors and supervises the quality of administrative adjudication, develops and implements rules, procedures, performance standards, training programs, contracts on behalf of OAH, approves forms and documents, and exercises all other duties consistent with the *Establishment Act*. (Tr 85-86; Px 3 and 5; DC Code § 2-1831.05(a)(5)). However, only the Commission on Selection and Tenure (COST) has the authority to appoint, reappoint, discipline and remove OAH ALJs. (Tr 71-72 and DC Code § 2-1831.06).

The OAH functional departments, also known as branches, identified above, are under the Chief Judge's direct supervision. (Px 1, 3 and 5). Acting as the Chief Judge's deputy, the Deputy Chief Judge (Deputy Chief), Mark Poindexter, also manages and supervises the ALJs in the Trials, Appeals and Judicial Management department, which is also referred to as a branch. (Tr 71, 73-74; 525-26; Px 1). It is undisputed between the Parties that the Chief Judge and the Deputy Chief are management officials or supervisors and cannot be members of a bargaining unit pursuant to DC Code § 1-617.09(b)(1).

The head of each functional department supervises, manages, and directs the work of the employees in the branch as depicted in the hierarchical organizational chart. (Tr 70-74; Px 1). Specifically, the Executive Director manages and supervises the administrative support staff, the IT administrative officer, and the HR specialist in the Agency Management and Operation Support branch. The General Counsel manages and supervises the professional staff, including attorney advisors, paralegals, and law clerks in the Judicial Assistance and Legal Counsel branch. The Clerk of Court manages and supervises the staff of the Case Management and Judicial Support branch (Clerk's Office), including the Deputy Clerk of Court, the customer service coordinator, the receptionists, the legal assistants, the court clerks and the legal administrative specialist. (Tr 70-71; Px 1).

OAH ALJs hold hearings and decide appeals from DC administrative agency decisions generally assigned to them on a rotating basis by the Clerk's Office. ALJs may



mediate certain cases as well. OAH has adjudicatory jurisdiction over more than 40 DC administrative agencies, boards and commissions. In Fiscal Year (FY) 2012, OAH's caseload was 16,051 cases. (Rx 8).

Cases appealed to OAH ALJs from different DC administrative agencies are grouped into 23 jurisdictions. (Tr 63 and Rx 8). For example, cases appealed from the Department of Employment Services involving unemployment insurance claims (UI) are grouped in the UI jurisdiction. (Tr 63). Cases within each jurisdiction are distributed among the ALJs as their designated jurisdictional assignments. An ALJ will have case assignments from a number of jurisdictions as determined by the Chief Judge. (Tr 64).

The jurisdictions are grouped into jurisdictional clusters based on related subject matter and are overseen by 6 Principal ALJs (PALJ). (Rx 8, Px 1). The PALJs have the same adjudicatory responsibilities as other the ALJs, but they are also responsible for some additional administrative duties within the jurisdictions and jurisdictional clusters that they oversee. (Tr 74-76, 340 and 427). For example, the PALJs coordinate and schedule; they review and study case management statistics and, at times on an *ad hoc* basis, they facilitate the resolution of problems. (Tr 74-76, 252-53 and 322-331). PALJs facilitate meetings with the public, stakeholders and OAH staff for matters within their assigned jurisdictions. (Tr 332-334).

PALJs are selected by the Chief Judge and returned to line-ALJ positions at the Chief Judge's sole discretion. *Id.* The Chief Judge has designated 6 ALJs as PALJs. (Rx 8). The ALJs and PALJs positions, duties and responsibilities are defined by the same DC Administrative Law Judge, ES-935-09, Position Description (ALJ PD). (Px 4). The record establishes that the PALJ title and position are not statutory and do not arise from the *Establishment Act*. In addition, there is no separate application process for the position. (Tr 74 and 321). The record establishes that the PALJ title is a working title only.

The evidence, exhibits and testimony establish that the PALJs do not manage or supervise the ALJs. (Tr 253 and 331). When a PALJ is out of the office or on leave, another ALJ, usually within the jurisdiction, will perform the PALJ's duties on a rotating basis. (Tr 179 and 327). The evidence establishes that PALJs' responsibilities and duties are most like project-managers or lead-workers or work-force-leaders or senior-level attorneys. Simply stated, they are first among equals. (Tr 253 and 331). The Parties stipulated that ALJs and PALJs share a community of interest. (Tr 349 and 400).

The *Establishment Act* states that ALJs' powers and duties include to "[f]ully participate in Office management committees and management activities to set and steer policies relating to Office operations, including, without limitation, personnel matters." (DC Code § 2-1831.09).

Currently, ALJs serve on 10 Management Committees including: Case Management and Quality Control; Ethics; Events; Mediation; Performance Measures; Recruiting; Risk Assessment Control (RACC); Rules; Training and Education; and Website. (Rx 9). All OAH ALJs serve or have served on a Committee and some serve or have served on multiple Committees. (Tr 731 and Rx 9). The Committees can be grouped as necessary into Standing Committees which then treat with OAH policies and key initiatives. (Tr 538 and 577). Some Committees address OAH policy formulation, such as the Rules and Ethics Committees. Finally, some Committees, known as Special Committees, are formed for specific and *ad hoc* purposes, such as the Salary Correction, Revenue, Mediation Room, Artwork, and Signage Committees. (Tr 541-42). The Committees develop only recommendations and in the case of the Ethics Committee only informal pre-decisional advice on ethics questions prosoed by AJLs. None of the Committees products, informal advice or formal written recommendations, is final and binding on OAH management or the ALJs and OAH staff.

Each fiscal year, the Chief Judge designates Chairs of the Standing and Special Committees, and invites interested ALJs to volunteer to serve on one or more Committees by contacting the designated Committee Chair. (Tr 119, 121, 272-273, 540-541 and 594; Px 28). The Committees are comprised of ALJs and other staff assigned to the Committees as determined by the Chief Judge. (Tr 594; Rx 9). The Standing Management Committees issue policy recommendations to the Chief Judge and provide text for the annual report regarding Committee accomplishments. (Tr 543; Rx 5 and Rx 12). The Chief Judge may or may not adopt the Committee recommendations and thereby the recommendations may or may not become an OAH policy, practice or work rule. The OAH Policy Manual (Manual) is approximately 93 pages printed on both sides. (Px 5). The Manual describes the current OAH policies, practices and work rules. As regards the Committee recommendations, the Manual states,

Although OAH encourages and makes much use of committee involvement, OAH management reserves the right to revise, supplement, or rescind any policies or portion thereof, from time to time as it deems appropriate. (Px 5).

The Ethics Code was adopted on August 31, 2004 and amended on June 15, 2005

by the Chief Judge as required by DC Code § 2-1831.05(a)(9). (Px 5). The Ethics Code is modeled on the 1995 Model Code for State Administrative Law Judges.

Relevant to this case, the Ethics Code requires an ALJ to “avoid impropriety and the appearance of impropriety in all activities.”

The Ethics Code states that an ALJ,

shall disqualify himself or herself in any proceeding in which the Administrative Law Judge’s impartiality might reasonably be questioned, including but not limited to instances where . . . the Administrative Law Judge has a personal bias or prejudice concerning a party or a party’s lawyer or other representative involved in the proceeding. (Px 5).

The Ethics Code also identifies permissible activities stating that an ALJ,

may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. An Administrative Law Judge may participate in or serve as an officer, director, trustee or advisor of an educational, religious, charitable, fraternal or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations . . . an Administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the Administrative Law Judge or will be regularly engaged in adversary proceedings before OAH. (Px 5).

The Ethics Code states an ALJ “should not engage in any other partisan political activity.” (Px 5).

## **CONTENTIONS OF THE PARTIES**

**OAH contends as follows:**

***The Establishment Act, DC Code § 2-1831, et seq.***

OAH asserts that because the *Establishment Act* requires ALJs to serve as managers and supervisors, they are precluded from inclusion in a bargaining unit pursuant to the CMPA. OAH argues that ALJs have a statutory obligation to function as managers and supervisors pursuant to DC Code §§ 2-1831.09(a)(5) and (6). OAH maintains that the

“shall” language of the Establishment Act is mandatory thereby requiring ALJs to serve as managers and supervisors. OAH argues that the OAH Standing Committees regularly issue significant policy recommendations and annual reports regarding accomplishments. OAH says the Chief Judge usually adopts Committee recommendations without alteration so that the recommendations become OAH policy. To support its argument, OAH cites the Confidential Report of Investigation by Leftwich & Ludaway, LLC which found, “committee input has helped to shape key management decisions over the past three (3) years.” (Rx 10). OAH maintains that DC Code § 2-1831.09(a)(5) establishes that ALJ duties are conclusively and inextricably aligned with OAH management and in addition ALJs effectively recommend policy decisions such that ALJs are properly excluded from a bargaining unit as managers.

OAH asserts DC Code § 2-1831.09(a)(6) requires ALJs to “supervise, direct and evaluate the work of employees assigned to him or her.” OAH argues several classifications of employees are routinely assigned to ALJs and for this reason as well, ALJs are precluded from being in a bargaining unit.

OAH argues that ALJs have a statutory obligation to supervise, direct and evaluate the work of employees assigned to them and that ALJs regularly participate in the supervision of OAH employees including attorney advisors, paralegals, legal assistants, law clerks. OAH argues that pursuant to their statutory obligation, ALJs manage and supervise these employees day-to-day and influence their hiring and firing.

For all these reasons, OAH concludes pursuant to the Establishment Act ALJs are supervisors and managers who are precluded from being part of a bargaining unit pursuant to the CMPA’s exclusion of management officials and supervisors.

### **Excepted Service and Senior Executive Attorney Service**

OAH asserts DC Code § 1-609.08(15) ALJs are deemed to be Excepted Service and the DC Council has linked ALJs to the Senior Executive Attorney Service (SEAS) in DC Code § 2-1831.05(11) applying an equivalent pay scale and retention allowances to the ALJ position. OAH argues ALJs’ Excepted Service status and their SEAS pay exclude their participation in a bargaining unit.

OAH asserts that DC Code § 1-617.09(b) excepts only management officials and supervisors who are fire fighters and DC Public School employees from exclusion as a

bargaining unit member. OAH argues the legal cannon *expressio unius est exclusio alternius* establishes that ALJs, who are statutorily defined as managers and supervisors, are not covered by the exception in DC Code § 1-617.09(b). ALJs are therefore excluded from a bargaining unit, OAH argues.

### **The OAH Committees**

OAH asserts that since ALJs perform managerial duties, they cannot participate in a bargaining unit. OAH provides a detailed discussion of the statutory duties and responsibilities of the Chief Judge and describes how the OAH Standing Committees have provided direct management support to the Chief Judge. The areas of direct management support from the Standing Committees OAH says include: training; recruitment; and mediation. OAH argues Special Committees exist to attain specific OAH objectives including the Committees on: *pro bono*; resources; and revenue. OAH argues *ad hoc* Committees participate in OAH management on issues such as: liaison; budget; planning; and meeting room scheduling.

OAH notes that IFPTE claims ALJ Committee participation does not make them managers because the Chief Judge retains final policy decision authority. Even if true, OAH says, this would not negate the ALJs managerial role under PERB precedent which recognizes that an employee who effectively recommends policy decisions is properly excluded from a bargaining unit. OAH argues the Chief Judge implements a vast majority Committee recommendations without alteration. OAH says ALJs' Committee work demonstrates their full integration as indispensable participants in OAH management so that they are clearly engaged in managerial activity.

### **ALJs as Supervisors**

OAH asserts because ALJs are supervisors, they cannot join IFPTE. OAH cites DC Code § 1-617.09(b) which defines supervisors as having the authority,

to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or evaluate their performance, or adjust their grievances, or effectively to recommend such action, if in the connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

OAH argues ALJs exert significant authority over the OAH staff, dole out assignments and submit evaluations.

OAH asserts that it need only prove ALJs perform at least one supervisory function defined in the CMPA to satisfy the exclusion of ALJs from a bargaining unit. OAH argues that ALJs perform or effectively recommend at least five of the supervisory functions: assign, direct employees, evaluate, and participate in hiring and discharging employees.

OAH argues ALJs assign projects and duties to Attorney Advisors, paralegals, law clerks, court clerks and other support and administrative staff. OAH argues ALJs have the responsibility to direct Attorney Advisors. OAH argues ALJs provide evaluations for Attorney Advisors and other supports staff. Finally, OAH says ALJs have influence over hiring and firing decisions of employees.

OAH concludes that because ALJs fulfill five of the primary CMPA supervisory functions, it has met the burden to prove that ALJs are supervisors and excluded from a bargaining unit.

OAH asserts that ALJs also exercise independent judgment and exercise authority in the interest of OAH.

For all these reasons, OAH concludes that ALJs are barred from inclusion in a collective bargaining unit pursuant to the CMPA.

### **Representation by IFPTE and AJLs' Ethical Obligations**

OAH asserts that DC Code § 1-617.01(d) does not allow participation in a bargaining unit "when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee."

OAH argues the Ethics Code, at Policy Manual § 3.1, constitutes grounds for prohibiting ALJs from organizing into an IFPTE bargaining unit. (Px 5). OAH asserts that the Ethics Code requires ALJs to "avoid impropriety and the appearance of impropriety in all activities" and requires an ALJ to "disqualify himself or herself in any proceeding in which the Administrative Law Judge's impartiality might reasonably be questioned." The Ethics Code states ALJs should not participate in "educational, religious, charitable, fraternal or civic organization [when it is] . . . likely that the organization will be engaged in proceedings

that would ordinarily come before the Administrative Law Judge or will be regularly engaged in adversary proceedings before OAH.” OAH argues as well that the Ethics Code prohibits an ALJ from “engag[ing] in any other partisan political activity.” (Px 5).

OAH argues that the IFPTE Constitution (Constitution) includes provisions which makes ALJs participation: improper or, at a minimum, creates the appearance of impropriety; creates both an actual conflict and an appearance of a loss of impartiality; requires affiliation with the Metropolitan Washington Council, AFL-CIO (MWC) creating a direct conflict for ALJs presiding over unemployment insurance cases (UI cases) due to the MWC Claimant Advocacy Program (CAP).

Regarding the IFPTE Constitution, OAH cites IFPTE’s Constitution § 17.1:

The following shall constitute offenses the commission of which shall, but not exclusively, subject any officer or member of the Federation or of any subordinate body of the Federation, or a subordinate body itself, to disciplinary action as set forth in this Article.

(a) Violating any provision of the Constitution or laws of the Federation or of a subordinate body or failure to perform duties or functions specified or required therein. (Rx 15).

In addition, OAH argues the Constitution broadly forbids,

(b) Engaging in any activity or course of conduct contrary or detrimental to the welfare or best interest of the Federation, or of a subordinate body, or member.

\* \* \*

(h) Willfully engaging in any acts or course of conduct which are inconsistent with the duties, obligations and fealty of the members of a trade union and which violate sound trade union principles or which constitute a breach of an existing collective

\* \* \*

(l) Failing to exercise responsibility toward the Federation or engaging in conduct which would interfere with the Federation's performance of its obligations. (Rx 15).

OAH argues that the Constitution states that the purpose of IFPTE is:

to safeguard, advance, and promote the principle of free collective bargaining, the rights of workers, and consumers, and the security and welfare of all the people by political, educational and other community activity; to provide assistance, financial, moral or other, to other labor organizations or other bodies having purposes and objectives in whole or in part similar or related to those of this organization; to protect and preserve the union as an institution and to perform its legal and contractual obligations. It is recognized that the problems with which this Federation is accustomed to dealing are not limited to "bread and butter" unionism or to organizing and collective bargaining alone, but encompass a broad spectrum of economic and social objectives as set forth above and as the union may determine from time to time; we, therefore, determine and assert that the participation of this labor organization individually and with other organizations in the pursuit and attainment of the objectives set forth herein are for the sole benefit of the organization and its members. (Rx 15).

OAH cites the IFPTE "Manual of Suggested Common Procedure" new member pledge which states,

President:

"Do you promise to abide by the laws of this union; promise to be loyal; and promise to put the interests of the International Federation of Professional and Technical Engineers before those of any other labor organization of which you may be a member of, now, or in the future?"

"Do you also promise that you will not purposefully wrong another member or permit a member to be wronged if you can prevent it; and that you will put self-serving actions aside as you direct your efforts to advancing the moral, intellectual, and economic condition of working people?"

"Do you further promise that you will buy union made items, and encourage others to do the same when and where you find it possible to do so?"

"To all promises, do you pledge on your honor to observe and keep as long as you are a member-or until such time as the International Federation of Professional and Technical Engineers releases you from such promises?"

President to members:

"Do you bear witness to these promises?"



Members in chorus:  
“We bear witness.” (Rx 15).

OAH asserts that IFPTE also requires affiliates to join the local council of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) which in the DC is the Washington Metropolitan Council (WMC) the sponsor of the Claimant Advocacy Program (CAP). OAH argues CAP was created to provide free legal assistance and attorney representation to employees appearing before ALJs in contested UI cases.

OAH maintains that based on the IFPTE Constitution requirements and the AFL-CIO’s CAP representation in UI cases, both an actual conflict and an appearance of the loss of impartiality would be presented in an ALJ-bargaining unit. Specifically, OAH argues, IFPTE member ALJs would have a sworn obligation to support CAP-represented employees which is ethically incompatible with their statutory obligation to “be responsible for the fair, impartial . . . disposition of the cases to which they are assigned.” (DC Code § 2-1831.08 (a)). OAH maintains that ALJs, as IFPTE members, would be required abandon their objectivity and to favor trade unions and CAP-represented UI claimants. OAH says that the mere association with IFPTE raises the appearance of impropriety.

OAH asserts that an IFPTE ALJs’ local’s affiliation with the MWC would create a direct conflict for the ALJs presiding over unemployment insurance cases because CAP is run by MWC of the AFL-CIO. (Rx 16). OAH argues that an ALJ’s recusal would not solve this conflict because to respond to UI case volume OAH has assigned 14 of 32 ALJs to hear UI cases. OAH says ALJs’ recusals would make it impossible to hear UI cases because only three judges, including the Chief Judge, could preside over UI cases.

OAH argues that IFPTE’s affiliation with the MWC presents an appearance of impropriety and an additional Ethics Code violation due to MWC’s direct involvement in partisan politics. OAH argues the Ethics Code discourages ALJs from engaging in partisan political activity and prohibits them from making political contributions while MWC supports activities on behalf of political candidates who support workers’ issues. If the ALJs were to be a part of a unit that joined the Metropolitan Washington Council, the ALJs would be affiliated with the Council’s partisan activities.

OAH argues, ALJs sometimes adjudicate cases involving political candidates and their decision could impact the outcome of a campaign. For this reason, OAH argues it is essential ALJs maintain the appearance of impartiality. OAH says even if the ALJ bargaining unit was exempt from IFPTE Constitution §§ 5.4 and 14.4, requiring MWC

affiliation, the appearance of impropriety would still exist because parties appearing before ALJs might not be aware of the exception.

For all these reasons, because ALJ representation by IFPTE would be improper or create the appearance of impropriety, they cannot legally join the IFPTE or be represented by IFPTE for collective bargaining purposes.

OAH asserts ALJ participation in a bargaining unit also would be incompatible with ALJ Official Duties because DC Code § 2-1831.09(a)(3) prohibits ALJs from engaging in conduct inconsistent with their duties, responsibilities, and ethical obligations, OAH argues that ALJs' membership in and representation by IFPTE violates the Ethics Code and prohibits their participation in the bargaining unit.

OAH argues the Ethics Code would not only be violated if other IFPTE members appeared before ALJs who were unionized, but also because the IFPTE would be pursuing activities and goals in direct conflict with the ALJs' Ethics Code. OAH says that such conflicts prohibit the ALJs' participation in a labor organization and the Ethics Code cannot be adjusted to resolve the conflicts including the prohibition of engaging in partisan political activity and evaluating consumer protection cases because the IFPTE Constitution specifically advances and promotes through political activity the rights of workers and consumers.

For these reasons, OAH concludes the ethical conflicts mandate exclusion of ALJs from an IFPTE bargaining unit and the DC Code prohibits ALJs' membership in a bargaining unit.

#### **IFPTE contends as follows:**

#### **Appropriate Bargaining Unit under the CMPA**

Initially, IFPTE asserts that the evidence supports a finding that a bargaining unit of OAH ALJs is appropriate and would promote effective labor relations and efficiency of agency operations under the CMPA. IFPTE says that since OAH has stipulated that the proposed bargaining unit members, ALJs and PALJs, share a proper community of interest, the remaining two questions are whether: ALJs are supervisors or management officials, and whether ethical conflicts forbids ALJs from organizing under the CMPA.

## **Other ALJ bargaining units**

Turning to other organized ALJs and legal professionals, IFPTE contends, based on testimony Shana Frost, Esq., DC Office of the Attorney General (OAG), Civil Litigation Division, that analogous DC employees have organized in bargaining units under the CMPA including the Office of the Attorney General (OAG) line attorneys, represented by the American Federation of State, County, and Municipal Employees (AFSCME), Local 1403.

IFPTE contends, as well, that Federal ALJs have organized into bargaining units under the analogous provisions of the Federal Labor Relations Authority (FLRA) based on the testimony of ALJ Marilyn Zahm, Social Security Administration (SSA) Office of Disability Adjudication and Review. IFPTE argues that approximately 1,300 SSA ALJs are represented by the Association of Administrative Law Judges, IFPTE.

IFPTE says that it represents well over a thousand ALJs at the Executive Office of Immigration Review (EOIR) and the SSA without conflicts of interest, impropriety or the appearance of impropriety based on Union membership arising at any time.

## **ALJs and PALJs are not management officials or supervisors**

On the issue of ALJs being management officials or supervisors, IFPTE argues that well-established PERB case law requires employees' actual job duties and responsibilities control whether ALJs are supervisors or management officials and not the Establishment Act. IFPTE says ALJs' actual job duties involve no supervision or management responsibilities. While ALJs are supported by attorneys and staff, these employees are supervised by others, including the Chief, Deputy Chief, General Counsel, and Clerk of Court, IFPTE says. IFPTE argues testimony established ALJs do not have staff assigned to them and do not have the authority to hire, fire, transfer, promote, or discipline OAH employees. IFPTE argues that the only work OAH contends is management official work is ALJs Committee work. IFPTE argues that the evidence shows ALJs do not set or steer OAH policy through these advisory Committees and setting and steering policy is the province of the Chief, Deputy Chief, Clerk, General Counsel, and Executive Director. IFPTE concludes, OAH ALJs are neither supervisors nor management officials.

IFPTE asserts that the CMPA standard, for determining an appropriate bargaining unit, requires decisions on a case-by-case basis. Further, IFPTE asserts that the statutory

definition of management official and supervisor at DC Code § 1-617.01(d) control the decisions.

IFPTE argues that ALJs are not supervisors under the CMPA and the Establishment Act provision stating ALJs will “supervise, direct, and evaluate the work of employees assigned to him or her” does not make ALJs supervisors under the CMPA. Furthermore, the PERB cannot ignore that ALJs do not have staff assigned to them; do not prepare performance evaluations; do not hire, fire, transfer, promote, or discipline employees; and merely provide routine review of staff work products. IFPTE concludes, OAH’s statutory argument is without merit and ALJs’ actual job duties and responsibilities control the determination as to whether they are supervisor. IFPTE asserts based on ALJs’ actual duties and responsibilities, they are not supervisors.

IFPTE argues ALJs act merely as team leaders based on being more senior or more experienced. IFPTE argues appointing staff to tasks, setting work priorities, shuffling work among employees, and determining employees’ workload are performed by the Chief, the General Counsel, and the Clerk of Court. Moreover, ALJs do not choose which employees are assigned to a task and find out a staff member has been assigned to assist on a task from the staff member.

IFPTE asserts that ALJs do not evaluate or discipline employees, but only offer recommendations, input, or feedback or fill out discrepancy reports and are generally not informed as to the outcome compliments or complaints. IFPTE notes that while PALJs gave input into performance evaluations of ALJs, they have but not done so since 2010.

IFPTE asserts that ALJs are not management officials and that no ALJs formulate and effectuate management policies. Furthermore, IFPTE asserts, the work performed by ALJs does not make them management officials because only the Chief has the power to set and carry out policy with only some of the authority delegated to the Deputy Chief by her. IFPTE argues OAH considers ALJs line judges fulfilling OAH's primary adjudication function and they do not have management policy-making responsibilities which are performed by the Deputy Chief on allotted time for supervisory and administrative work, but dedicate their time towards adjudication of cases.

IFPTE asserts, as well, that PALJs are not management officials because they have the same adjudicatory responsibilities as ALJs and their responsibilities for administrative functions including: coordinating scheduling, reviewing case management statistics and

facilitating conflict resolution. IFPTE says, PALJs are one among equals and when out of the office, ALJs perform the PALJ duties on a rotating basis.

IFPTE asserts that ALJs' service on Committees does not make them management officials because not all ALJs serve on Committees along with staff attorneys, attorney advisors, and other support staff. IFPTE argues that Committee service does not magically transform ALJs into management officials because their role on Committees is to provide technical advice and to formulate advisory recommendations forwarded to the Chief for a final decision which does not establish that ALJs are management officials. ALJ-Committee work is not autonomous and proposals, recommendations and advice are rejected by upper level management from time-to-time.

IFPTE asserts that other DC legal professionals and other Federal ALJs are not management officials and its recognition petition does not present an issue of first impression. Further, several state-level administrative tribunals have ALJ unions.

IFPTE asserts that nothing in the DC Code requires ALJs to be considered management officials despite OAH reliance on DC Code §2-1831.09(a)(5). IFPTE says, ALJ Committee participation does not automatically make them management officials because the actual ALJ job duties and responsibilities control this determination. ALJ's participation on Committees only results in recommendations to the ultimate decision maker, the Chief or her designee. The *Establishment Act* is aspirational and ALJs are undisputedly not management officials and not supervisors.

IFPTE asserts that salary has no bearing on whether ALJs are management officials or supervisors because OAG attorneys, represented by AFSCME Local 1403, are compensated more than the many managers and ALJs are not SEAS attorneys, only paid on a similar pay scale.

### **An ALJ bargaining unit will not result in a conflict of interest or impropriety**

IFPTE asserts that ALJ-participation in a labor organization will not result in a conflict of interest or otherwise be incompatible with law or ALJ official duties. Specifically, IFPTE argues the IFPTE Constitution encourages cooperation with regional and central labor councils and Locals are not required to do so because they have the option whether or not to join a regional or central labor council, including the Metropolitan Washington Council, AFL-CIO. Therefore, IFPTE says an OAH IFPTE Local will not be required to participate

in any regional or central labor committees, including the MWC. For example, IFPTE says, IFPTE Local 1921 is not a member of the Metropolitan Washington Council, AFL-CIO. IFPTE argues that ALJs are bound by the Judicial Code of Conduct and the Ethics Code, no differently than organized OAG attorneys, and other legal professionals and adjudicators who are bound by ethical obligations as well. IFPTE argues that union membership does not create any conflict of interest or actual or appearance of impropriety or affect an ALJ's judicial impartiality or independence with regard to these codes of ethics or affect an ALJ's judicial impartiality or independence. IFPTE maintains as well that an exclusive representative for OAH ALJs does not conflict with ALJs ethical obligations. IFPTE argues its Constitution does not require allegiance to the Union over the judicial ethical obligation of impartiality or any applicable ethics obligations applicable to ALJs.

IFPTE says OAH argues as well that ALJ participation in a union creates a conflict of interest as regards partisan political activity. But, IFPTE argues, the evidence contradicts OAH's conclusion and potential conflicts can be easily avoided, for example the Local would not be required to participate in regional labor councils or make political contributions.

IFPTE asserts ALJ membership in a union will not violate any rule regarding political participation because no IFPTE per capita dues go to political contributions because IFPTE has a voluntary Political Action Committee (PAC) separate from union dues. Furthermore, IFPTE says, no OAH ALJ dues paid will be used for political contributions and OAH ALJs will not be bound or obligated by IFPTE political endorsement or political activity.

For these reasons, IFPTE concludes, the evidence establishes that OAH ALJs are neither supervisors nor management officials and there is no conflict of interest or appearance of a conflict of interest under the CMPA preventing ALJs to organize into a bargaining unit of all OAH ALJs, including PALJs, with excepting the Chief, the Deputy Chief and the PALJs for Case Management and Quality Control.

## DISCUSSION

The hearing and adjudication of this case is governed by PERB Rules 502.10 and 502.11. The rules permit a preliminary investigation of a representation petition by holding an investigatory, non-adversarial hearing to develop a full and factual record upon which the PERB may make a decision. There is no burden of proof on either Party.

OAH has challenged IFPTE's Recognition Petition contending that: ALJs cannot be included in the petitioned for bargaining unit because the *Establishment Act* precludes ALJ inclusion in a bargaining unit; ALJs are actively engaged in day-to-day OAH management and supervise OAH personnel which excludes them from a bargaining unit; and ALJ-association with and representation by IFPTE would violate OAH's Ethics Code and create a conflict of interest. As the Party resisting the IFPTE's *Petition*, OAH bears the burden of production of evidence to support its challenges.

For the reasons discussed below, the Hearing Examiner finds that OAH has not produced evidence to support its challenges, and OAH ALJs and PALJs are not management officials or supervisors within the meaning of CMPA, and that there is no conflict of interest, appearance of a conflict of interest or impropriety created by exclusive representation by IFPTE.

### **I. ALJ Duties and Responsibilities and the CMPA Exception of Management Officials and Supervisors From Inclusion in a Bargaining Unit**

#### **Relevant Statutory Provisions**

The rights of DC employees to be represented by a labor organization are described in DC Code § 1-617.01(a) and (b) which states that the DC government,

. . . finds and declares that an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.

. . . [e]ach employee of the District government has the right, freely and without fear of penalty or reprisal:

- (1) to form, join and assist a labor organization or refrain from this activity;
- (2) to engage in collective bargaining concerning terms and

conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative; and  
(3) to be protected in the exercise of these rights.

The plain meaning of this statutory provision establishes that DC employees have a protected, **individual** right to form, join and assist a labor organization and engage in collective bargaining through that labor organization as their designated representative. These protected, individual rights are repeated and reinforced by similar language at DC Code § 1-617.06(a) which states,

. . . [a]ll employees shall have the right:

- (1) To organize a labor organization free from interference, restraint, or coercion;
- (2) To form, join, or assist any labor organization or to refrain from such activity; and
- (3) To bargain collectively through representatives of their own choosing as provided by this subchapter.

However, these protected, individual rights do not extend to all employees without exception. Specifically, DC Code § 1-617.09(b)(1) states “[a] unit shall not be established if it includes . . . any management official or supervisor.” By way of definition, DC Code § 1-617.01(d) states,

[s]upervisor means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

These statutory provisions form the basis of the Hearing Examiner’s recommendation regarding OAH’s challenge to ALJs representation by a labor organization based on OAH’s assertion that ALJs are management officials and supervisors.

### **ALJ Duties and Responsibilities and the *Establishment Act***

OAH contends that the *Establishment Act*, at DC Code § 2-1831.09(a)(5) and (6),



statutorily establishes ALJs are managers and supervisors excepted from a collective bargaining unit and excepted thereby from the protected, individual right to form, join or assist a labor organization. OAH initial contention is statutorily based asserting that as a matter of law the *Establishment Act* requires ALJs to be managers and supervisors. OAH relies on the *Establishment Act's* language which defines ALJs' powers and duties as follows,

(a) An Administrative Law Judge shall:

\* \* \*

(5) Fully participate in Office management committees and management activities to set and steer policies relating to Office operations, including, without limitation, personnel matters;

(6) Supervise, direct, and evaluate the work of employees assigned to him or her;

\* \* \*

OAH argues, standing alone, the *Establishment Act* statutorily establishes ALJs are managers and supervisors and therefore, are, by law, excepted from a bargaining unit and representation by a labor organization as a matter of law. In this regard, OAH presented no material evidence that the *Establishment Act* amends the CMPA so as to abridge an ALJ's protected and individual right to form, join or assist a labor organization. The *Establishment Act* is silent regarding ALJs' rights to organize for collective bargaining purposes under the CMPA.

Absent a clear, unambiguous link between the two statutes in this regard, the cannons of statutory construction require the two statutes to be read so as to harmonize their language, provide maximum meaning to every provision and not do damage to the individual rights contained in either. Based on this statutory construction and the plain language of both statutes, the Hearing Examiner finds that the *Establishment Act* does not take away an ALJ's right to form, join or assist a labor organization by operation of law. The Hearing Examiner finds that in determining whether ALJs are management officials or supervisors under the CMPA, their actual duties and responsibilities control.

Therefore, the analysis turns to the *Establishment Act's* requirement that ALJs "supervise, direct and evaluate the work of employees assigned to him or her." The record testimony and exhibits establish that at OAH no employees are assigned to ALJs or PALJs. (Px 1). Despite this fact, OAH argues ALJs: assign projects, direct employees, evaluate employee performance, participate in employee hiring and participate in employee discharge. The record testimony and exhibits establish that OAH is a hierarchical organization divided into four functional departments: Judicial Corps; Office of General Counsel; Office of the Clerk of the Court; and Administrative Staff. (Px 1). The functional department to which ALJs are assigned, the Judicial Corps, is managed and supervised solely by the Deputy Chief ALJ who is a direct-report to the Chief Judge, the head of the agency. ALJs do not assign projects, the Deputy Chief or Chief Judge does.

From time-to-time, to adjudicate cases, which is the primary duty and responsibility of ALJs, to manage case load and to develop Committee recommendations, employee teams form as necessary around these assignments as determined by the OAH management, not by the ALJs. The ALJs often serve as the team leader on these assignments and supervise and manage the **work** as project managers or work force leaders or senior employees, but there is no material evidence that they direct or supervise the other employee team members, including those assigned to the Committees, as an OAH supervisor or manager.

The testimony and exhibits establish that ALJs may, from time-to-time, comment favorable or unfavorable to an employee's supervisor on the performance of the employee working on the teams or Committees or otherwise working with the ALJs, but ALJs do not prepare performance evaluations.<sup>4</sup> Moreover, there is no evidence, testimony or exhibits to support the conclusion that ALJ-performance comments, positive or negative, constitute effective recommendations on employee performance evaluations in the other departments. (Rx 4, 26, 30 and 31). ALJ comments are mere input and the final determination on an employee's evaluation is made by the employee's supervisor in one of the other departments. Significantly, ALJs do not know the performance evaluation outcomes of employees in the other departments. Furthermore, there is no credible, material evidence that ALJs hire or discharge OAH employees or effectively recommend

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<sup>4</sup> See, for example, OAH, Office of the Clerk Discrepancy Notice (Rx 11A, 11B, 24 28 and 29) completed by an ALJ, but the corrective action is taken exclusively by the employee's supervisor, the Clerk or Deputy Clerk).

hiring or discharge.<sup>5</sup> The record establishes that none of the duties and responsibilities of ALJs include the traditional indices of supervision as defined in the CMPA.

For all these reasons, particularly based on the actual duties and responsibilities of the ALJs, the Hearing Examiner finds OAH ALJs are not supervisors within the meaning of the CMPA.

Based on DC Code § 2-1831.09(a)(6), OAH asserts that ALJs are managers based on the requirements of the statute and ALJs' service on the OAH management Committees. The Parties describe these OAH Committees at great length and in exacting detail in their post-hearing submissions. The record shows that ALJ-membership on and leadership of the Committees is determined solely by the Chief Judge or Deputy Chief Judge. Furthermore, not all ALJs serve on Committees and, consistent with OAH's contention, arguably, the Hearing Examiner must conclude, these ALJs do not participate in the management of OAH at all. Based on the facts, such a conclusion is without merit. For the reasons discussed below, the Hearing Examiner has concluded the record establishes work on the Committees does not transform ALJs into management officials under the CMPA.

Testimony and exhibits establish that some Committees are permanent, some special and some *ad hoc*. Setting aside both Parties' extensive descriptions of the Committees, the most significant and material fact regarding the committees is that ***no Committee recommendation*** binds OAH management to a policy or creates a work rule or implements a practice or becomes a working condition unless and until the recommendations are adopted by OAH management, ultimately the Chief Judge.

Specifically, the OAH Policy Manual states,

Although OAH encourages and makes much use of committee involvement, OAH management reserves the right to revise, supplement, or rescind any policies or portion thereof, from time to time as it deems appropriate. (Px 5).

Significantly, OAH's "encouragement and making much use of committee

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<sup>5</sup> The record contains no evidence of ALJs hiring or discharging employees. However, ALJ Steven M. Wellner testified about an incident involving a paralegal who acted disrespectfully towards him. While Wellner reported the incident to the General Counsel, the employee was disciplined by her supervisor, not Wellner. (Tr 367-374 and 383-386)

involvement” does not support the conclusion that ALJs’ Committee service constitutes management of the agency, particularly since OAH management, in the person of the Chief Judge, totally reserves the right “to revise, supplement, or rescind any policies . . . it deems appropriate.” In addition, by describing the work of the Committees as “involvement,” the Committees’ roles in the management of OAH are clearly diminished to collateral support functions in policy decisions made solely by OAH’s core management: the Chief Judge; the Deputy Chief Judge; the Executive Director; the General Counsel; and the Clerk of the Court. (Px 1).

The record establishes that, while the *Establishment Act* may require ALJ’s “full participation in Office management committees and management activities,” some ALJs do not serve on Committees at all and, in the final analysis, no ALJs participate in management activities because the Committee recommendations are totally subject to approval and adoption by OAH’s management core.

For all these reasons, the Hearing Examiner finds ALJs and PALJs are not management officials within the meaning of the CMPA.

## **II. ALJ Representation by IFPTE and Ethical Prohibitions of Conflict of Interest**

### **Relevant Statutory Provisions**

The CMPA establishes ethical limitations on employee participation in a bargaining unit at DC Code § 1-617.01(d) which states,

Subsection (b) of this section does not authorize participation . . . by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee.

This statutory language limits an employee’s “right, freely and without fear of penalty or reprisal . . . to form, join, and assist a labor organization” under DC Code § 1-617.01(b) when the employee’s participation results in a conflict of interest or is incompatible with law or the employee’s official duties.

OAH argues, based on IFPTE’s Constitution, that ALJ participation in an IFPTE bargaining unit would be ethically improper and a conflict of interest or create the

appearance of impropriety and conflict of interest, and violate the OAH Ethics Code so as to be incompatible with the ALJs' official duties.

### **The OAH Ethics Code and the IFPTE Constitution**

The OAH Ethics Code requires ALJs to “avoid impropriety and the appearance of impropriety in all activities.” (Px 5, II.A.).

The Ethics Code requires an ALJ to “disqualify himself or herself in any proceeding in which the Administrative Law Judge’s impartiality might reasonably be questioned.” (Px 5, III.N.).

The Ethics Code states ALJs should not participate in “educational, religious, charitable, fraternal or civic organization . . . if it is likely that the organization will be engaged in proceedings that would ordinarily come before the Administrative Law Judge or will be regularly engaged in adversary proceedings before OAH.” (Px 5, V.C.).

Finally, the Ethics Code prohibits an ALJ from “engag[ing] in any other partisan political activity.” (Px 5, V.V.).

OAH’s ethical challenge to IFPTE’s representation of ALJs is based on the agency’s reading of the IFPTE Constitution at Article 3, *Purpose*; Article 5, *Membership*; Article 17, *Discipline-Offenses*; and the appendix entitled *Manual of Suggested Common Procedure*.<sup>6</sup> (See quoted sections of IFPTE Constitution under OAH contentions).

The main focus of OAH’s challenges to IFPTE’s representation concerns the IFPTE Constitution, Article 14.1 which states only employees “favorable to trade unions” may organize into an IFPTE Local.<sup>7</sup> OAH argues if an ALJ presides over a case in which a party is a member of or represented by a union, then the appearance of impropriety will arise.

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<sup>6</sup> The IFPTE Constitution appendix *Manual of Suggested Common Procedure* does not establish mandatory procedures for locals. The unrebutted, credible testimony from Marilyn Zahm, SSA ALJ, and Executive Vice President, Association of Administrative Law Judges, IFPTE, (Tr 204-229), and Christopher Langford, Organizer/Strategist, IFPTE, and formerly a GAO analyst, (Tr 407-423), established that IFPTE locals are free to formulate procedures consistent with the agency or employer’s legal and ethical requirements and the employees’ duties and responsibilities.

<sup>7</sup> This sort of union constitutional language is commonly recognized as intended to guard against “salting” which is the illegal practice employed by unscrupulous management to place anti-union employees in the rank-and-file of a labor organization to disrupt representation.

Additionally, OAH argues that the IFPTE requirement of membership in the MWC, an AFL-CIO affiliate, and the potential representation of UI claimants by MWC's Claimant Advocacy Program (CAP) creates a conflict of interest and appearance of a conflict of interest. (Rx 16).<sup>8</sup>

OAH's argument is speculative on several levels and lacks a credible, factual foundation in the record.

First, OAH's argument assumes all ALJs hear UI cases. The record is clear, they do not. Only ALJs assigned to the UI cluster hear UI cases on a regular basis. Therefore, logically extending OAH's argument, there is no conflict of interest or appearance of a conflict of interest as regards the ALJs who do not hear UI cases and there would be no reason to exclude these ALJs from a bargaining unit represented by IFPTE.

Second, OAH argues UI cases constitute the second largest OAH case load at 2,179 cases. OAH argues, if ALJs must recuse themselves from UI cases based on IFPTE representation, the agency cannot do its job. While the total UI case load figure is correct based on OAH's *Fiscal Year 2012 Annual Report* (FY12 Report), a review of all figures shows that UI cases amounted to approximately 16.6% of OAH's total case load.<sup>9</sup> (Rx 8). However, FY12 Report statistics also state OAH held 6,223 hearings, far less than the total FY12 case load of 16,051 cases. Some less number of the total 6,223 hearings in FY12 must have been UI hearings, perhaps 16.6%. The Ethics Code adequately provides for this level of case load. Specifically, the Ethics Code states that an ALJ "shall disqualify himself or herself in any proceeding in which the Administrative Law Judge's impartiality might reasonably be questioned." (Px 5). Thus, the Ethics Code provides for the individual decision to recuse oneself if an ALJ determines his or her impartiality might reasonably be questioned. OAH produced no evidence that the Ethics Code's placing an individual responsibility for recusal in a case will not serve to resolve any conflict of interest or potential conflict of interest.

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<sup>8</sup> Rx 16 is a flyer posted at OAH which describes potential free legal help in UI cases for **both** Claimants, from CAP sponsored by MWC, and for employers, from the Employer Advocacy Program (EAP) sponsored by the DC Chamber of Commerce (DCCC). Arguably, an ALJ with associations to the DCCC would also raise a conflict of interest or the appearance of a conflict of interest based on OAH's theory of the case.

<sup>9</sup> OAH's *Fiscal Year 2012 Annual Report* (Rx 8) states that the total case load was 16,051 and Department of Employment Services cases total 2,179.

Furthermore, the PERB precedent has resolved an agency's challenge to a representation petition based on similar facts and similar employees regarding an agency's concerns for ethical conflicts of interest or potential conflicts of interest with regard to Hearing Examiners' duties and responsibilities of the DC Bureau of Traffic Adjudication (BTA).<sup>10</sup> The BTA objected to BTA Hearing Examiners' inclusion in an existing non-professional employees bargaining unit because the consolidated unit was precluded by DC Code § 1- 617.01(d).<sup>11</sup> BTA asserted that a potential conflicts of interest would arise when other bargaining unit members appeared before the Hearing Examiners. This is the identical assertion of OAH with regard to ALJs hearing UI cases in which the claimant is represented by a union or by CAP.

The PERB rejected BTA's argument determining that DC Code § 1- 617.01(d) does not provide a basis for determining the appropriateness of a bargaining unit and any potential conflict of interest was appropriately addressed by BTA's rules, which could be adjusted to resolve these issues. Based on PERB precedent, OAH's concern for a conflict of interest or the appearance of a conflict of interest does not provide a basis for rejecting the proposed bargaining unit of ALJs. In IFPTE's representation petition as well, union membership will not affect the ALJ impartiality any more than ALJs' membership in churches, clubs and other association groups or organizations. In this regard, it is significant that OAH's existing rules state that "family, social, political or other relationships" shall not "influence judicial conduct or judgment." (Px 5).<sup>12</sup>

The Hearing Examiner finds that the PERB's determination regarding conflicts of interest or potential conflicts of interest as regards union representation of BTA Hearing Examiners establishes precedent which is directly applicable to OAH's challenges of IFPTE's representation of ALJs.

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<sup>10</sup> *AFGE Local 1975 and DCDPW*, PERB Case No. 88-R-03, Op. No. 195 (1988).

<sup>11</sup> The PERB Opinion cites DC Code § 1-618.1(d) which has been renumbered as DC Code § 1-61.01(d).

<sup>12</sup> OAH can eliminate its concern for a conflict of interest or the appearance of a conflict of interest arising in UI hearings before an ALJ when the claimant is represented by a labor organization or CAP by assigning those cases to the Chief Judge or the Deputy Chief Judge. If the volume is too high so as to render this approach impractical, OAH can seek the exclusion from the bargaining unit of a few specific ALJs to hear UI cases in which the claimant is represented by a labor organization or CAP. This is the approach taken in the OAG as regards Assistant-Attorneys General (AAG) in OAG's Personnel, Labor and Employment Division who work on personnel, labor relations and employment matters. These AAGs are excluded from the AFSCME, Local 1403 bargaining unit. (Tr 389-390).

Third, OAH's argument is speculative. Specifically, OAH challenge is based on the chain of speculation that if a UI claimant is a union member and if the union is an AFL-CIO affiliate and if the union is an MWC/AFL-CIO member and if the claimant is represented by CAP or a union representative, a conflict or interest or the appearance of a conflict of interest may arise. The OAH chain of speculation also ignores the ALJ's ethical obligation to recuse himself or herself when a conflict of interest or the appearance of a conflict of interest arises in a case he or she is hearing. The OAH argument assumes the worse of its ALJs and asserts he or she may not or will not recuse himself or herself which is yet another speculative assumption.

The entire OAH argument based on the Ethics Code in relation to the IFPTE Constitution is extremely attenuated, vague and speculative argument.

For these reasons, and the reasons discussed in the PERB BTA precedent, OAH's challenges on these grounds do not form a basis under DC Code § 1- 617.01(d) on which to deny employees the individual right to form, join or assist a labor organization.

Finally, besides the DC BTA Hearing Examiners, the evidence establishes that IFPTE specifically, and labor organizations generally, represent many ALJs and other government professionals who must adjudicate legal disputes and maintain impartiality under a statute and/or code of ethics. For example, IFPTE represents ALJs at the Social Security Administration, Office of Disability Adjudication and Review, and the Department of Justice, Executive Office of Immigration Review. IFPTE represents Analysts at the Government Accountability Office, a Federal agency which is statutorily required to be impartial and non-partisan. Legal counsel at the highest level of the DC government are represented by labor organizations, for example the American Federation of State County and Municipal Employees, Local 1403, represents the attorneys of the DC Office of the Attorney General.

For all these reasons, the Hearing Examiner finds that the IFPTE Constitution does not create a conflict of interest or the appearance of a conflict of interest with DC Code § 1- 617.01(d) or the Ethics Code for OAH Administrative Law Judges. (Px 5). Further, the Hearing Examiner finds representation by a labor organization is compatible with ALJs' duties and responsibilities.



## **Partisan Political Activity and the Ethics Code**

OAH asserts that MWC advances political causes to protect the rights of its members and affiliates, of which IFPTE is one. OAH argues MWC is often involved in partisan political activity including contributions to partisan political campaigns. OAH argues this activity violates the Ethics Code citing the provision which states that “Administrative Law Judges should not engage in any other partisan political activity.” (Px 5).

The testimony and evidence establish that IFPTE’s political action fund is not supported by dues but only by voluntary member contributions. OAH’s argument, that MWC’s political action would violate Ethics Code and constitute partisan political activity by ALJs, was unsupported by evidence or testimony. There is no record evidence that IFPTE’s representation of ALJs constitutes *partisan* political activities in violation of Ethics Code.

For these reasons, the Hearing Examiner finds that OAH’s speculative assertions that provisions of IFPTE’s Constitution violate the Ethics Code’s provision that ALJs “should not engage in . . . partisan political activity” and will somehow taint ALJs’ impartiality is without merit.

## **Senior Executive Attorney Service Pay and ALJs Excepted Service Status**

OAH asserts that ALJs enjoy SEAS salary compensation and are Excepted Service employees. OAH argues, ALJs’ high salary ranges establish they are management officials and cannot be part of a bargaining unit. OAH argues since ALJ are attorneys, like Excepted Service attorneys who are excluded from collective bargaining, ALJs must be excluded from representation by a labor organization.

As with the argument above, OAH provides no record evidence to support its argument. As discussed above, under the CMPA, the determination of whether an employee is a management official is not based on salary but is based on the actual duties and responsibilities the employee performs. Nothing in the CMPA set salary as the basis for denying an employee the right to form, join or assist a labor organization.

Additionally, ALJs, while in the Excepted Service, are not Excepted Service Attorneys. OAH’s argument in this regard is without basis in fact.

For these reasons, the Hearing Examiner finds that OAH's argument that ALJs cannot be part of bargaining unit based on SEAS pay and Excepted Service status is without merit.

## **MAYOR'S AMICUS CURIAE BRIEF**

The Hearing Examiner has discussed above how the submission of *amicus curiae* briefs is not prohibited by the PERB's rules and that such submissions, while not common, have been accepted by the PERB. Nonetheless, the submission of an *amicus curiae* brief from the Mayor is, arguably, extraordinary.

DC Code § 1-617.01(c) provides that "[t]he Mayor or appropriate personnel authority, including his or her designated representative(s), shall meet at reasonable times with exclusive employee representatives to bargain collectively in good faith." To implement the Mayor's collective bargaining responsibilities, DC Code § 1-605.01 provides for the PERB's establishment. The DC Code provides that the PERB is to be comprised of 5 members selected by the Mayor. Relevant to this case, DC Code § 1-605.02(1) and (2) gives the power to the PERB to resolve unit determinations, majority status, certify and decertify exclusive bargaining representatives.

Therefore, based on these statutory provisions, the Mayor's position, as the executive officer responsible for bargaining in good faith with exclusive representatives of DC employees, on the potential collective bargaining organization of OAH ALJs by IFPTE is material to PERB's decision on the *Petition*.

The Mayor asserts that the CMPA does not, as a matter of law, bar ALJs from forming a union. He asserts ALJs are not supervisors or management officials simply by virtue of their positions. The Mayor argues that the *Establishment Act* provides that the Chief Judge shall supervise OAH. (DC Code § 2-1831.05(a)). The Mayor says that while the *Establishment Act* states ALJs shall "supervise, direct, and evaluate the work of employees assigned to him or her," no employees are assigned to ALJs. The Mayor cites the OAG attorney bargaining unit as an example of an environment in which union representation "has proved an effective avenue for the attorneys to resolve their disputes with OAG management while ensuring OAG continues to run efficiently."

The Mayor asserts judicial ethics do not necessarily prohibit IFPTE's representation of OAH ALJs based on IFPTE's Constitution. The Mayor references OAH's challenges

regarding UI cases and the prohibition on ALJ's engaging in partisan political activities or making political contributions. The Mayor says ALJs can ensure their union membership does not affect their impartiality as have GAO Analysts represented by IFPTE.

The Mayor asserts Federal and 5 State ALJs have successfully unionized to resolve labor disputes. Similarly, the Mayor says, collective bargaining can address genuine issues between the ALJs and OAH and provide a promising means for addressing and resolving labor relations issues involving compensation and working conditions.

For these reasons, the Mayor respectfully requests that the PERB expedite a formal in this matter.

## RECOMMENDATIONS

Based on this investigatory-informal conference, the Hearing Examiner recommends the following:

1. The description of the bargaining unit which IFPTE seeks to be certified as the exclusive representative be defined as:

All Administrative Law Judges and Principal Administrative Law Judges in the District of Columbia Office of Administrative Hearings appointed pursuant to DC Code §§ 2.1831.06 and 2.1831.08, excluding all management officials, supervisors, confidential employees, employees engaged in personnel work other than in a purely clerical capacity, and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

2. The PERB order a representation election in accordance with its Rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sean J. Rogers", is written over a horizontal line.

Sean J. Rogers, Esq.

Hearing Examiner

November 8, 2013