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PUBLIC EMPLOYEE RELATIONS BOARD
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Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO	
Petitioner	PERB Case No. 20-U-30
v.	Opinion No. 1762
District of Columbia Public Schools	
Respondent	

DECISION AND ORDER

A. Statement of the Case

On July 8, 2020, the Washington Teachers' Union, Local # 6, American Federation of Teachers, (WTU) filed an Unfair Labor Practice Complaint (Complaint) against the District of Columbia Public Schools (DCPS), alleging violations of the Comprehensive Merit Personnel Act (CMPA)[1] by DCPS' refusal to bargain health and safety protections and protocols related to WTU's bargaining unit members return to in-person learning during the COVID-19 pandemic.

A hearing was held on August 28, 2020. On October 1, 2020, the parties submitted post-hearing briefs. On October 19, 2020, the Hearing Examiner submitted a Report and Recommendations (Report). On October 20, 2020, the Board ordered preliminary relief that required the parties to bargain and additional preliminary relief. Thereafter, on October 26, 2020, the Respondent filed Exceptions to the Report. On October 28, 2020, the Complainant filed an Opposition to the Exceptions.

B. Exceptions

In its Exceptions, DCPS focused on its post-hearing conduct to argue that the record does not support the Hearing Examiner's finding of a refusal to bargain.[2] However, its post-hearing conduct, if accurately reported, does not excuse DCPS' refusal to bargain, its bargaining in bad

[1] D.C. Official Code § 1-617.04(a)(1) and (a)(5).
[2] Exceptions at 5. DCPS list 17 bargaining sessions that occurred after the hearing and mentions an October 14, 2020, tentative agreement on matters related to health and safety.

faith, or its direct dealing to undermine the WTU. Post-hearing conduct is in fact irrelevant to the findings of the Hearing Officer.

There is ample evidence in the record that DCPS asserted that it had no duty to bargain over health and safety issues and, as the Hearing Examiner found, DCPS' actions amounted to a refusal to bargain over these issues.[3]DCPS (1) refused to bargain and made unilateral changes by issuing guidelines for new working conditions without negotiation,[4] (2) engaged in direct dealing by issuing surveys to the bargaining unit regarding returning to work,[5] and (3) breached its duty to bargain by declaring mandatory health and safety proposals as non-negotiable[6] despite clear precedent from the Board.[7]

The Board has explained that the declaration of a public emergency will not excuse the bargaining obligations of the parties when there is time to negotiate.[8] Here, the Hearing Examiner found that DCPS delayed re-opening for in-person instruction on several occasions and consulted numerous sources in formulating its pandemic action plan without engaging in good faith bargaining with WTU.[9]

In its Opposition to the Exceptions, WTU argues that DCPS "failed to identify any plausible grounds for its Exceptions to the Hearing Examiner's decision."[10] WTU asserts that the record supports the Hearing Examiner's findings because DCPS failed to engage in the "give and take" of bargaining and violated its duty to negotiate in good faith.[11] WTU urges the Board to adopt the Report.[12]

The Board denies DCPS' Exceptions. The Board finds that the Hearing Examiner's Report is reasonable, supported by the record, and consistent with Board precedent.[13]

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[3] Report at 16.
[4] Report at 16. The record is clear that DCPS implemented changes prior to substantive bargaining and impact and effects bargaining despite a clear request from WTU.
[5] DCPS concedes this point and raises no Exception to the Hearing Examiner's findings on this issue.
[6] *Teamsters, Local 639 v. DCPS*, Slip Op. No. 267 at n.9, PERB Case No. 90-U-05 (1991) (finding "that in an unfair labor practice proceeding, the negotiability of a subject and therefore the respondent's duty to bargain may well be the first question, but the final question will be whether the challenged conduct was a breach of such a duty. A negotiability appeal "pure" will not present that second question.").
[7] *AFGE Local 631 v. OLRCB*, 67 D.C. Reg. 8882, Slip Op. No. 1743 at 9, PERB Case No. 20-U-23 (2020).
[8] *FOP/ DOC Labor Comm. v. DOC*, 67 D.C. Reg. 8532, Slip Op. No. 1744 at 5, PERB Case No. 20-U-24 (2020) (citing *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007), which held that the company committed an unfair labor practice when it failed to bargain over the decision to use nonbargaining unit employees to finish work because the time for immediate decision-making had passed.).
[9] Report at 20.
[10] Opposition to Exceptions at 11.
[11] Opposition to Exceptions at 8.
[12] Opposition to Exceptions at 11.
[13] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 6, PERB Case No. 15-U-28 (2018). *See AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

C. Conclusion

The Board has considered the Hearing Examiner's Report that is attached to this Decision and Order, and the record in light of the Exceptions, Opposition to Exceptions, and briefs. The Board affirms the Hearing Examiner's rulings, findings, and conclusions, and adopts the recommended Order, as modified, and set forth below.

ORDER

IT IS HERBY ORDERED THAT:

1. The District of Columbia Public Schools shall cease and desist from interfering with, restraining, or coercing employees in their rights guaranteed to them under D.C. Official Code § 1-617.04 (a)(1) and (a)(5).

2. The District of Columbia Public Schools shall cease and desist from directly dealing with bargaining unit members in a manner that serves to undermine the Washington Teachers' Union.

3. The District of Columbia Public Schools shall cease and desist from refusing to bargain in good faith with the Washington Teachers' Union.

4. The District of Columbia Public Schools shall cease and desist from implementing changes in employment pertaining to health and safety without fulfilling its bargaining obligation with the Washington Teachers' Union.

5. The District of Columbia Public Schools shall bargain in good faith with the Washington Teachers' Union until the parties have a signed agreement or the parties reach impasse.

6. Within ten (10) days from service of this Decision and Order, the District of Columbia Public Schools shall post the attached notice conspicuously where notices to bargaining unit employees in this bargaining unit are customarily posted and electronically distribute to each bargaining unit member the notice through email or similar means in which notices are customarily distributed. Once posted, the Notice must remain posted until thirty (30) days after all bargaining unit members return to work.

7. The District of Columbia Public Schools shall notify the Board of the posting within fourteen (14) days after issuance of the Decision and Order requiring posting.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
By vote of Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler. (Chair Douglas Warshof recused.)

Washington, D.C.
October 29, 2020

NOTICE

TO ALL EMPLOYEES REPRESENTED BY THE WASHINGTON TEACHERS' UNION, LOCAL 6 AT THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN OPINION NO. 1762, PERB CASE NO. 20-U-30.

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the Comprehensive Merit Personnel Act and has ordered us to take certain actions and post this notice.

WE WILL cease and desist from interfering with, restraining, or coercing our employees represented by the Washington Teachers' Union, Local 6 in the exercise of their rights under the Comprehensive Merit Personnel Act.

WE WILL cease and desist from refusing to bargain in good faith.

WE WILL negotiate in good faith until we reach written agreement with the Washington Teachers Union, Local 6, or reach impasse in negotiations before implementing changes over mandatory subjects of bargaining.

WE WILL NOT attempt to circumvent the union by directly dealing with employees represented by the Washington Teachers' Union, Local 6 concerning return to in-person teaching and learning.

District of Columbia Public Schools

Date: _____

By: _____

(Chancellor)

This Notice must remain posted for thirty (30) consecutive days after all bargaining unit members return to work and must not be altered.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, by email at perb@dc.gov, by mail at 1100 4th Street SW, Suite 630E, Washington, D.C. 20024, or by phone at 202-727-1822.

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

Washington Teachers' Union, Local 6,
American Federation of Teachers, AFL-CIO

(Complainant)

PERB Case No. 20-U-30

:

District of Columbia Public Schools

(Respondent)

Lee W. Jackson, Esq., Daniel M. Rosenthal, Esq., and Michael P. Element, Esq.,
for the Complainant
Stephanie T. Maltz, Esq., Kathryn Nayor, Esq., Michael Levy, Esq.
for the Respondent

Report and Recommendation

Statement of the Case

Eric M. Fine, Hearing Examiner. This case was tried before me on August 28, 2020, via a virtual proceeding implemented in Washington D.C, pursuant to a complaint filed on July 8, 2020, by the Washington Teachers' Union Local 6, American Federation of Teachers, AFL-CIO (Complainant, Union or WTU) against the District of Columbia Public Schools (DCPS or Respondent).[1] On July 8, the Union filed a Request for Preliminary Relief, and by letter dated August 3, PERB's Executive Director denied that request. On August 13, the Union filed a motion to file an amended complaint, along with a first amended complaint. By letter dated August 20, PERB's Executive Director stated, "WTU will have the opportunity to present facts to support the allegation of the complaint during the hearing. The purpose of a hearing is to develop a full and factual record upon which the Board may make a decision. Therefore, the Motion is denied."[2]

Issues

The complaint alleges that on June 30, 2020, DCPS sent WTU bargaining unit members

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[1] All dates herein are in 2020, unless otherwise stated. For purposes of brevity, all individuals will be identified, to the extent permitted, by their full name and title, and thereafter respectfully referred to by their last name.

[2] During the day of the hearing, the parties discussed the inclusion in the record of joint exhibits 1 to 44, with Joint Exhibit 44 being a stipulation of certain facts. At my request, following the hearing, DCPS forwarded these exhibits to the court reporter, although their entrance into the record does not appear in the transcript. Nevertheless, the parties have relied on these exhibits in their post-hearing briefs, the witnesses testified concerning some of the exhibits, they are part of the administrative record, and I am correcting the transcript to include these exhibits as part of the hearing record in this case.

two documents via email: (1) DCPS Return to In-Person Work Guidelines ("Guidelines"); and (2) DCPS Employee Return to In Person Work Intent Form ("Intent Form"). It is asserted that the documents were shared with Union officials only a few hours before they were sent to teachers. It is asserted the two documents unilaterally imposed new terms and conditions of employment on teachers without first bargaining with the Union, including terms and conditions that affect the health and safety of bargaining unit members and subject members to new categories of discipline. It is asserted that the Guidelines state that an operational guidebook will be forthcoming, the contents of which had not been bargained with the Union. It is asserted that on July 2, 2020, the Union sent Chancellor Ferebee a request to bargain regarding the Guidelines and the Intent Form. The complaint alleges that by refusing to bargain with the WTU, unilaterally imposing changes on bargaining unit members without bargaining, and dealing directly with bargaining unit members regarding mandatory subjects of bargaining, DCPS has interfered with, restrained and coerced employees in the exercise of their rights, and has restrained and coerced employees, in violation of D.C. Code §§ 1-617.04(a)(1) and (a)(5).[3]

Findings of Fact

I. Jurisdiction

DCPS is an agency of the District of Columbia as defined in D.C. Official Code, Section 1-603.01(1). The Union is a labor organization within the meaning of the Comprehensive Merit Personnel Act of 1978. The Union has been certified by the PERB as the exclusive representative for the employees in question specified in PERB Case No. 80-R-09, Certification No. 12, August 30, 1982 and PERB Case No. 88-R-09, Certification No. 56, September 21, 1989. Both parties are subject to the PERB's jurisdiction in accordance with D.C. Official Code § 1-602.01.

II. Alleged Unfair Labor Practices

A. Findings of Fact[4]

The Union and DCPS are parties to a Collective Bargaining Agreement covering employees in the Union's bargaining unit. The parties' most recent CBA is dated October 1, 2016, through September 30, 2019, and remains in effect between the Parties while a successor agreement is negotiated. On March 10, 2020, Union President Elizabeth A. Davis sent a letter to DCPS Chancellor Lewis Ferebee requesting information about the protocols that DCPS planned to put in place to prevent the spread of COVID-19. Davis testified she wrote the letter due to teachers expressing concern as to whether or not they would be required to report to their schools for in-person teaching, given that many of them had underlying health

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[3] The Union attached what is has labeled as WTU Ex's. 2 and 3, to its post-hearing brief, pertaining to DCPS mailings to bargaining unit members on September 29, and the Union's response thereto arguing that I should reopen this record asserting that these documents show a continuation of the conduct at issue herein by DCPS, and therefore there is a compelling reason for me to reopen the record for their admission. This I decline to do. Aside from the obvious due process considerations for DCPS, this case apparently involves an ongoing dispute amongst the parties, and the admission of evidence of post-hearing events would serve to delay this decision.

[4] There were three witnesses who testified at the hearing in this proceeding. Taking into consideration their demeanor, I have concluded that all testified in a credible fashion, to the extent their memories would permit.

conditions. Davis testified that most of the schools were old with faulty ventilation systems. Davis testified that, based on information the teachers were hearing from various sources, DC Health and the CDC, they raised concerns about whether or not it would be safe for them to be required to do in-person teaching in their buildings.

On March 11, DC Mayor Muriel Bowser declared a state of emergency and a public health emergency resulting from the COVID-19 pandemic. On March 13, the Mayor announced that the D.C. government would adjust its operating status, beginning March 16, to mitigate the spread of COVID-19. On March 13, Chancellor Ferebee announced that DCPS would begin modifying school operations on March 16 through April 1. Specifically, teachers and staff would report to school to plan for distance learning while students would not report to school. The announcement stated that from March 24 to March 31, students will participate in distance learning, and that on April 1, schools will resume operations. On March 20, Ferebee announced that the schools would remain closed, and distance learning continued through April 24, with classes resuming on April 27. On April 17, Ferebee announced the schools would remain closed and distance learning would continue through the end of the school year stated to be May 29.

On May 8, Union bargaining unit members met virtually with Ferebee and other DCPS representatives to discuss ideas and recommendations regarding DCPS's plans to reopen schools for in-person learning during the COVID-19 pandemic. On May 9, Davis sent Ferebee an email thanking him for joining contract negotiations on May 8, with a list of 16 items to be discussed as they move forward in their contract talks. Ferebee responded by email dated May 11, thanking Davis for the comprehensive list of issues regarding reopening the schools, stating DCPS looked forward to continuing discussions and working with the Union to address complex issues in reopening the schools, but stating that the May 8 meeting was not a contract negotiation session.

Davis testified that the Union created a taskforce on re-opening schools. Davis, who had not been a classroom teacher for six years, testified she wanted active teachers to provide input on some of the structures they needed to have in place for teachers and students if the schools re-opened. The task force consisted of over 200 teachers, as Davis wanted to hear from teachers pre-K through 12, as well as groups pertaining to special education and English language learners to cover a broad spectrum of concerns. Davis testified, in particular, early grade teachers pointed out why it would be a problem for students at certain grade levels and ages to be expected to wear PPE all day in a school, and whether they were able to understand the need for social distancing. Davis testified that counselors, social workers, and other service providers were also on the taskforce. Davis testified the task force developed recommendations as teachers wanted to see specific details as to what should be in place in every school in order to re-open for in-person learning.

On June 22, Davis sent DCPS officials a copy of recommendations prepared by the Union's task force on reopening DC Schools. Davis invited DCPS officials to attend a briefing by the chairs of the taskforce on June 23, and on June 24, Union taskforce members met virtually with DCPS officials to brief them on the taskforce's recommendations. They met again with DCPS officials, including Ferebee, on June 26 to brief them on the taskforce's recommendations.

On June 30, DCPS sent Union bargaining unit members two documents via email: (1) DCPS Return to In-Person Work Guidelines ("Guidelines"); and (2) DCPS Employee Return to

In Person Work Intent Form ("Intent Form"). DCPS sent the documents via email to Union representatives the same day that they were sent to teachers.

The Intent Form states that "As the District government begins to return to normal operations, and we prepare for the School Year 2020-21 reopening, we are asking all employees to complete and submit this form to assist with planning." The Intent Form states that the "in-person return to work date for employees will be determined based on public health data...". However, it states, in bold print, "Please complete all sections of this form and submit no later" than July 10. The Intent Form gives employees two options to choose from under the heading "Work Setting Considerations:"

> I plan return to in-person work, with the provision of safety measures aligned to DC Health recommendations.; or
>
> I believe I have a qualifying medical condition pursuant to FMLA and/or ADA and I plan to apply for leave or I do not have a qualifying medical condition, but I believe I am at higher risk (Higher Risk Guidance) for severe illness due to COVID-19 pursuant to the Families First Coronavirus Relief Act (FFCRA) and do not plan to return in person for safety and/or health reasons for myself or someone in my household.

The Intent Form states, "If there are other concerns not related to FMLA, ADA, and/or FFCRA, please follow up directly with your supervisor." The Form ends with an "Acknowledgment" section stating that "By typing my name below, I certify that I have answered all questions to the best of my ability, and I acknowledge that DCPS will use this information to assist with planning for the in-person return to work for DCPS staff."

Davis testified, concerning the Intent Form, that the first time she saw the Form was when a teacher took a photo of the form and texted it to Davis. Davis testified that DCPS did not present it to her in the course of contract bargaining. Davis testified that, after receiving the Form from the teacher, Davis checked her email and discovered that DCPS sent the Form to her on the same morning it was sent out to teachers. However, Davis identified the email to herself and Ngwa sent from Powe, dated June 30, at 2:08 p.m. to which the Intent Form was attached. The email also references the "In Person Return to Work Guidelines" as an attachment. The email states, "we are asking staff to please review the attached Guidelines and complete the attached DCPS Employee Return to In-Person Work Intent Form no later than Close of Business (COB) Friday, July 10, 2020. The responses we receive will be considered as we continue planning for the in-person return to work for DCPS staff."

Davis testified that most teachers report questions to one of the Union's five field representatives. Davis testified when she read the Form, she contacted the field representatives, and they reported to her that they had received a flurry of calls from teachers who did not feel comfortable signing the Form. The teachers wanted to know if the Union had approved it and, if the Union was were even aware of it. Davis testified the teachers felt they did not have sufficient information to make an informed decision about whether or not to sign. Davis testified that one of the concerns expressed by the teachers was they had not received enough information about what was to be expected if they returned to in-person teaching. They did not know what safety protocols had been instituted in their schools. Davis testified they knew the condition of their buildings, before the pandemic, and that many of them knew there were issues about having buildings cleaned on a daily basis. Davis testified the Union sent a notice to all of their members asking them to hold off on signing the form until the Union had an opportunity to communicate with DCPS.

Davis testified the second option on the form spoke to those teachers who have qualifying medical conditions. Davis testified they did not have sufficient information to determine if it was okay for them to sign. Davis testified the teachers felt that even if they had underlying health conditions, they wanted to keep their jobs, and they did not see a place that suggested they would have the option of doing distance learning or teaching virtually if they had underlying health conditions. Davis testified they felt pressured to sign the document because they felt they did not have a choice. She testified the document did not suggest they had an option to continue with distance learning at the re-opening of schools. Davis testified the Union had an influx of calls from teachers who would qualify for retirement, and a number called making preparation to retire in the event that they would be forced to return to in-person teaching.

Davis testified, that to her knowledge, DCPS did not directly inform the teachers prior to the July 10 deadline that the teachers were not required to sign the Intent Form. Davis testified that, after the Union expressed concern about the Form having been sent without the Union's knowledge, DCPS informed the Union in writing that staff were not required to complete the Form, and they would not be disciplined for not completing it. Davis testified that to her knowledge no teachers suffered any consequences for not completing the Form.

Union Field Representative Jared Catapano testified that he received calls from teachers upon their receipt of the Intent Form. He testified that teachers told him over the phone they were concerned about what would happen if they did not complete the form. Catapano testified teachers told him that it was their understanding they were required to sign the form, and that they were concerned that if they signed the document they would be asked to come to work in an unsafe condition. He testified they expressed concerns related to the pandemic, such as social distancing, contact tracing, etc. Catapano testified, to his knowledge, DCPS never told teachers directly that they would not receive consequences for failing to sign the form.

Donielle Powe is the Deputy Chief for Labor Management and Employee Relations for DCPS. Powe testified that no member of the Union's bargaining unit has been disciplined for failing to respond to the Intent Form. Powe identified a DCPS response to an information request by the Union, wherein the Union asked if DCPS intended to impose negative consequences on teachers who did not fill out the Intent Form by July 10, or by a later date. As part of DCPS response, it is stated, "Staff will not be disciplined for not completing the intent to return form." Powe testified that DCPS did not communicate this response directly to the teachers. Powe testified that DCPS did not bargain with the Union regarding the Intent Form or the Guidelines before they sent it to the teachers. When asked if DCPS included any option on the form or subsequent communications giving teachers the option to not return to work, if they did not have a qualifying medical condition, Powe pointed out that on the Intent Form it stated, after the choice of checking off one of two boxes on the form, that if there are other concerns not related to the medical issues, they should follow up directly with their supervisor. However, DCPS stated in the above referenced response to the Union's request for information page 2, item 6, that "If a staff person does not qualify for an approved leave or is not considered at risk, they will be expected to return to work. Before returning to work, DCPS will provide details on the health and safety measures put in place for a safe and strong reopening."

The Union alleges in its complaint that the Guidelines unilaterally imposed new terms and conditions of employment on bargaining unit members, including terms and conditions that affect the health and safety of bargaining unit members and subject members to new categories of discipline. The Union cites, in the complaint, certain language from the Guidelines, asserting, that the Guidelines state that:

a. "DCPS will implement a hybrid learning model for the 2020-21 School Year (SY) that will include continued virtual instruction and in-person instruction for a portion of our students";
b. "Central office staff whose roles require them to be on-site and can safely perform their roles will be expected to work on-site for their standard tour of duty. Central office staff whose work does not require them to be on-site to fulfill their roles will be provided options to work remotely through a modified rotational telework policy";
c. Employees must begin wearing face masks, and if they do not they "will be subject to progressive discipline";
d. DCPS will administer daily health screenings. If a bargaining unit member experiences certain symptoms listed in the Guidelines, DCPS will instruct the employee "to not enter DCPS buildings, to isolate immediately, and call their healthcare provider";
e. DCPS will provide "staff members working with students with high levels of need and staff members managing students and/or staff identified as potentially positive will receive additional PPE on top of the baseline mask distribution." But the Guidelines do not state specifically what staff members will be eligible for increased PPE, or what that increased PPE may include;
f. "All employees will be required to participate in a mandatory Return to In-Person Work webinar before their first day of in-person duty. This webinar will review standard safety protocols and expectations to ensure employee safety and wellbeing during the public health emergency. More information related to this training will be shared soon." The Guidelines do not state whether bargaining unit members will be paid for time spent attending the mandatory webinar.
g. Employees are eligible for several categories of leave if they meet certain criteria. However, the Guidelines require that "[o]nce an employee determines that they will be absent from work for more than five business days for one of the eligible reasons provided in the sections above, they must complete a Request for Leave of Absence and upload a medical certification in the Leave of Absence application in Quickbase.";
h. If an employee does "not qualify for paid leave through" one of the programs referenced in the guidelines, the employee must "use accrued annual leave" if they feel unsafe returning to work.

On July 5, Davis sent Ferebee an email requesting to bargain regarding the Guidelines and the Intent Form stating that to the "extent DCPS may assert that any of the foregoing is a nonnegotiable management right, WTU would dispute that assertion, but DCPS should nevertheless bargain with the WTU over the impact and effects of such decisions. Until the parties have had an opportunity to bargain over these matters, DCPS should withdraw both documents and inform teachers that they need not respond by the July 10 deadline." By email on July 6, Powe, responded to Davis' July 5, request to bargain by stating: "As previously discussed, DCPS is willing to engage in impacts and effects bargaining with you concerning reopening. Before we begin bargaining for the reopening, we should meet to discuss initial ground rules. We would like to be efficient while observing that everyone is busy at this time of year. Since we already have Thursdays set aside, are you available to meet on Thursday, July 9 (or 16), at 11:00am?"

On July 7, Davis responded to Powe stating that the Union would agree to meet for bargaining on July 9 and further that "I also want to make clear that WTU is not only requesting to bargain over the impacts and effects of reopening, but also regarding DCPS's policies for reopening, which affect the health and safety of WTU members and, per the recently issued Guidelines, impose new discipline on teachers for failure to comply with DCPS policies." Davis

stated to Powe that you have refused to indicate whether DCPS will bargain over the Intent Form and Reopening Guidelines, and whether DCPS will rescind those documents pending the completion of negotiations. It is asserted that the negotiations could not be effective while those documents are in effect. Davis stated that the discussion of ground rules on July 9, was unnecessary, that the parties should proceed directly to substantive discussion in view of the July 10, deadline that DCPS has imposed on teachers to complete the Intent Form.

The parties met for bargaining on July 9, 15, 23, 30, August 6, 13, and 20. On July 9, the Union presented DCPS with a written proposed draft "Temporary Memorandum of Agreement during COVID19" (MOA) which detailed proposals that the Union sought to bargain over prior to the reopening of DCPS schools for in-person learning, including issues affecting the health and safety of returning teachers. Union bargaining representatives also presented the proposals orally to DCPS bargaining representatives on July 9. DCPS representatives asked questions regarding certain Union's proposals for in-person hybrid learning during that session. The parties did not reach agreement on any of WTU's proposals during that session. The MOA states it was drafted by a team of over 200 members and field representatives of the Union.

Davis testified one topic in the MOA related to cleaning of schools. Davis testified that, although this varies from school to school, it was reported that schools are under-staffed as far as custodial services, and that there are buildings that are not cleaned regularly. She testified that teachers thought if schools were short staffed before the pandemic, there was concern that buildings would not be adequately cleaned after the pandemic. Davis testified that even though DCPS had issued statements that they were going to ensure safety protocols would be instituted in every school, based on their experience, the teachers wanted something in writing that DCPS would comply with the safety guidelines that had already been issued by the Office of the State Superintendent, by the Department of Health and CDC. Davis testified that a lot of the language in the MOA was lifted from those guidelines from DCPS, from DC Health, from OSSE, with very little of this language being created by Union members. The Union members wanted it in writing and wanted the chancellor and Davis to agree that these safety protocols would be in place in all schools.

Davis testified there is a discussion in the MOA about changing the rules on large groups or large assemblies. Davis testified that for several years the Union had reports of class sizes that exceed the contract limits. Teachers have been flexible knowing that some schools have been under-staffed. Davis testified that now for in-person teaching those numbers would have to be drastically reduced in order for students to be able to socially distance in classrooms. Davis testified that from grade level to grade level, teachers express various concerns based on the behaviors of their students, especially early grade students and special needs students, and they wanted to ensure that class sizes were going to be adapted to comply with CDC guidelines for social distancing.

Concerning communication or signage about social distancing in the MOA, Davis testified they were offering a recommendation to have inspection teams for every school to put teachers and parents at ease about whether or not the schools will be ready when they re-open for in-person teaching. She testified from the very entry into the building, the hallways, into the bathrooms, into offices, the counselors' suites this was one of the recommendations. She testified the teachers wanted to see evidence that the buildings were actually going to be ready to receive students and teachers and other staff safely. Davis testified the teachers focused on details that were absent from the Mayor's re-open report, and the MOA

contains a lot of those issues.

Davis testified that at MOA page 13, subparagraph a, there's a reference to ensuring that ventilation systems operate properly. Davis testified there are a number of schools that have been modernized, but a lot of them have not. Davis testified they have a lot of very old buildings. Davis testified she has worked in several of them that are over 50 and 70 years old. Davis testified that concerning some of the newer facilities that have been modernized, such as Roosevelt High School, teachers constantly contacted the Union last year and the previous year about the facility having a ventilation system that had not worked properly since the school was constructed. Davis testified that one of the individuals that worked with the Union's task force was a former commissioner of health in D.C. Davis testified that he focused on ventilation, and that he attended one of Davis monthly meetings with Ferebee to talk about this issue because it is a critical area that cannot be fixed overnight. Davis testified that teachers who worked in those buildings before the pandemic knowing that they had faulty ventilation systems, and air conditioning that did not work, were concerned about whether those systems were going to be repaired before the schools were re-opened.

Catapano testified, that as a member of the Union's bargaining committee, he has participated discussions with DCPS representatives regarding reopening schools. Catapano testified that he attended the July meeting when the Union presented the MOA to DCPS. Catapano cited some of the provisions of the MOA during his testimony. He stated at page 12, paragraph 10 it states that DCPS shall comply with all CDC, OSSE, and DC Health policy guidelines for reopening schools. Catapano testified that page 23, section 19, provisions a through d, speak to group activities or large gatherings at schools in an effort to make sure that large gatherings would not happen which would increase the probability of contracting the virus. He testified that section c there is a reference to maintaining six feet of distance. Catapano testified that at page 10, there is a discussion about directions and assistance to schools in developing protocol. Catapano testified this was included to keep students and teachers safe, but specifically to help with contact tracing if there is a contamination. Catapano testified that page 20, subsection e, related to screening procedures, which was an attempt to keep students and teachers away from people who may be exhibiting symptoms.

Catapano testified, that as far as he knew, there is a mandate in D.C. to wear a mask in public. He testified that page 15, paragraph 14, there is a reference to face coverings being used at all times, and there is also a reference to exceptions to that rule. Concerning the exceptions, Catapano testified the Union knows that people have other underlying health conditions or have any number of reasons to struggle to wear a mask. Catapano testified that at page 16, paragraph 15, there is a reference to what to do if there is an exposure at a school in an effort to help with contact tracing. He testified that subsection c states that DCPS would shut down schools within 24 hours of a notification. Catapano testified the Union wanted this provision because they know that the virus is easily communicable and the short turnaround time trying to figure out who was infected and how. He testified that at page 24, paragraph 21, there is a reference to cleaning protocols. Catapano testified that, from his experience as a teacher at Lafayette Elementary School, they were historically shortchanged on custodial staff. Catapano testified the Union wanted to make sure that schools are as clean as possible for the safety of students and teachers. He testified that at page 19, paragraph 17, there's a reference to COVID testing at all school sites. Catapano testified the Union wanted to make sure that these tests were not only available, but were administered appropriately.

On July 15, DCPS presented an overview of its planned hybrid learning model to Union bargaining representatives. At a press conference on July 16, the Mayor announced that the

District would not make a final decision on implementing this hybrid learning model until July 31. On July 21, DCPS presented a draft of its "Reopen Strong COVID-19 Operations Handbook Guidance" for in-person hybrid operations/learning ("Handbook"). In her July 21, email to the Union, Powe stated that the Handbook was "to ensure processes and systems are in place that prioritize the health and safety of all students and staff should health conditions allow for learning at school." In a July 21, email to Powe, Ngwa stated "Can you confirm that DCPS will negotiate with WTU over the terms and conditions reflected in this document before taking any action to implement it?" Powe responded on July 23, stating that "By and large, the Operations Manual reflects the exercise of management's rights, including to determine educational policy and mission as well as to determine internal security controls and protocols to safeguard students and all employees against the spread of COVID 19 in schools with the reopening of in-person school operations. As such, management intends to negotiate this as part of the impact and effects on reopening." On July 23, DCPS Deputy Chancellor Amy Maisterra orally presented the draft Handbook to the Union's bargaining committee members. Davis testified there was no bargaining over the specific terms of the Handbook at the July 23, session, and no bargaining since that time.

On July 30, the Mayor announced that DCPS schools would begin the year with all-virtual learning for the first term until at least November 6. Beginning with the July 30, bargaining session, the Parties focused on proposals and counterproposals regarding the impending start of the first term of the school year with all virtual instruction. At bargaining on July 30, the Union highlighted the specific Union MOA proposals that the Union identified as applicable to a virtual only setting.

On August 6, DCPS sent a tracked changes document to the Union with proposed edits and deletions to the Union's MOA proposals. DCPS also included comment bubbles in the document indicating provisions of the MOA that DCPS asserted were non-negotiable. On August 6, Powe presented DCPS' comments and counter proposal to Union's MOA and the topics that DCPS asserted were non-negotiable, as reflected in the August 6 tracked changes document. A general review of the DCPS response to the Union's MOA reveals that most of the Union's 46-pages of proposals were lined over in the form of a cross-out by DCPS, along with comments along the side. In response to what had been MOA page 12, paragraph 10 stating that DCPS shall comply with all CDC, OSSE, and DC Health policy guidelines for reopening schools; DCPS responded, "Non-negotiable management right to determine operation and requires compliance with guidance that is not law and is fluid." Concerning MOA page 23, section 19, provisions a through d, which Catapano testified speak to group activities or large gatherings at schools, DCPS responded, "All of 19 and subsections is non-negotiable, management right to determine operation, budget and employees needed." Catapano testified that page 20, subsection e, related to screening procedures, which was an attempt to keep people in the building safe, students and teachers, from people who may be exhibiting symptoms. DCPS response was that "All struck language (section 18 and its subsections below) is non-negotiable, management right to determine operation, budget and employees needed. Additionally, places requirements on equipment/duties of employees outside of the bargaining unit." In this regard, Davis testified that, during the August 6 session, DCPS was presenting their response, and most of the comments and responses from DCPS where there were strikethroughs, was this is a management's right. Davis testified that whenever it was designated that it was non-negotiable, DCPS stood on the notion that this is a non-negotiable management right.

On August 13, the Union provided DCPS with Revised MOA proposals which focused exclusively on distance learning. On August 20, the Parties exchanged multiple rounds of

counterproposals regarding the Revised MOA specifically focused on distance learning. Davis testified that on August 27, the parties finalized a short version of the MOA, only dealing with distance learning. Davis testified that they wanted to have something in place because on Monday, students are going to report to D.C. Public Schools virtually for the first time, and the Union wanted to have an agreement that we could share with their members about some of the guidelines around distance learning.

Davis testified the Union team saw the need for an agreement for distance learning so they were willing to delay any discussions about the language pertaining to in-person teaching until after the agreement on distance learning was reached. Davis testified there was one advisory for distance learning, in that the Mayor and Chancellor announced the distance learning period will be from August 31 until November 6, and the Union did not know what would happen as of November 6, or when schools would open for in-person learning. Davis testified the Union wants to have something more specific in place about in-person teaching before it begins. Davis testified that the Union has never withdrawn its request to bargain over health and safety matters for in-person learning. Davis testified that the Union had never withdrawn its request to bargain over the specifics of the Handbook that had been presented to the Union. Davis testified, in her view, as a former educator, the schools are not ready to receive students based on what she knew about the 115 schools in the DCPS chain. Davis testified the buildings are not ready, and the fact they were not given funds for PPE is a red flag. Davis testified that the Union thought re-opening 100 percent was a problem they could work with DCPS and the Council to get the additional resources needed to ensure that all of the schools would be able to institute the safety protocols that DC Health and CDC says should be in place.

Davis testified that at some time in the future, DCPS will open for in-person learning. She testified the Union maintains that prior to that time it would like to negotiate over health and safety policies at DCPS schools. When asked if she had received any further communication from DCPS notifying her that the topics they identified as non-negotiable in the track changes document, that they are now willing to negotiate about, Davis testified, "No, not really. We're hoping that further discussions with them would nudge them into agreeing to that, but I have not gotten any such notice, no." Powe testified that for all of the items in the Union's initial MOA that DCPS marked as non-negotiable on August 6, that DCPS continues to assert that those items are non-negotiable.

Analysis

a. Legal Principles

In *AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining,* PERB Case 20-U-23, (3/31/2020), at 1, motion for reconsideration denied. (5/8/20), the Board issued a decision pertaining to a "Motion for Preliminary Relief." It was noted that the "Union alleges that the Agencies violated the Comprehensive Merit Personnel Act (CMPA) by refusing to negotiate over the changes in working conditions unilaterally implemented in response to the coronavirus pandemic (COVID-19) and by failing to provide information necessary for the Union to fulfill its responsibilities." It was stated therein that:

> On March 11, 2020, the Mayor of the District of Columbia issued an Executive Order declaring a state of emergency in response to the public health emergency caused by COVID-19.4 On March 17, 2020, the Council of the District of Columbia enacted the COVID-19 Response Emergency Amendment Act of 2020, (COVID-19 Emergency Act), which amended the District of Columbia Public Emergency Act and

provided the Mayor with enumerated personnel powers to address COVID-19.5 The language of the new section states in pertinent part:

> Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.*) ("CMPA") or the rules issued pursuant to the CMPA, . . . or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:
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> (A) Redeploying employees within or between agencies;
> (B) Modifying employees' tours of duty;
> (C) Modifying employees' places of duty;
> (D) Mandating telework;
> (E) Extending shifts and assigning additional shifts;
> (F) Providing appropriate meals to employees required to work overtime or work without meal breaks;
> (G) Assigning additional duties to employees;
> (H) Extending existing terms of employees;
> (I) Hiring new employees into the Career, Education, and Management Supervisory Services without competition;
> (J) Eliminating any annuity offsets established by any law; or
> (K) Denying leave or rescinding approval of previously approved leave.6

The Board pointed out that the Agencies raise D.C. Official Code Sec. 1-617.08(a)(6), stating that management has the right "to take whatever actions may be necessary to carry out the mission of the District government in emergency situations." The Board went on to state:

> The first issue before the Board is whether the Agencies had a statutory duty to bargain during the emergency. In general, it is an unfair labor practice to refuse to bargain in good faith.18 D.C. Official Code § 1-617.08 affords certain rights to management, which are nonnegotiable. However, even as to such nonnegotiable management rights, management must, upon request by the union, still bargain the impact and effects of its exercise of those rights.
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> Specifically relevant to the current dispute, D.C. Official Code §1-617.08(a)(6) states that management retains the sole right to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations."19 That right must be read in conjunction with the COVID-19 Emergency Act, which contains language enumerating the personnel actions the Mayor may take in section 301(a)(16), subsections (A)-(K).20 The Council, by using the broad "notwithstanding clause," evidenced its intent to have the newly enacted amendment narrow the scope of the statute's earlier iteration.21 The Board holds that the Council limited the authority of the Mayor during the pandemic emergency with respect to personnel actions and thereby limited the potential for broader action and impermissible erosion of collective bargaining rights in the name of an emergency. Therefore, the Board will treat actions enumerated in subsection (A)-(K) of the COVID-19 Emergency Act22 taken during the pandemic as management rights, and those unilateral personnel actions are permitted in response to the current emergency. As stated above, management rights are nonnegotiable but are subject to impact and effects bargaining upon request.23
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> The Board also recognizes that some emergencies call for immediate action resulting in the suspension of the duty to bargain. However, the Board, like the NLRB, adopts a narrow view in applying this exception to the general duty to bargain. In *Port*

Printing,24 the NLRB explained a narrow exception to the duty to bargain during a financial emergency. The NLRB explained that the economic exigency exception is "limited to extraordinary events, which are an unforeseen occurrence, having major economic effect requiring that the company take immediate action."25 "Absent a dire financial emergency. . . economic events such as a loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *Id.* at p 4.

The Board went on to state:

> The Board finds this reasoning persuasive. The Board holds that, in an instance of an extraordinary event, which was an unforeseen occurrence, requiring an agency to take immediate action, management has the right to take actions it deems necessary to carry out its mission. But it must bargain the impact and effects of its decision. Moreover, if during the state of emergency the need for immediate decision-making has passed, then management must engage in substantive bargaining over mandatory subjects of bargaining. The COVID-19 emergency and the law enacted by the D.C. Council permitted DPW to make the decision to transition to a 10-hour shift. The decision is a nonnegotiable management right.
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> A union has the right to impact and effects bargaining over a management right only when it makes a timely request to bargain. An unfair labor practice is not committed until there Decision and is a request to bargain and a "blanket" refusal to bargain.35 Absent a request to bargain, management does not violate the CMPA by unilaterally implementing a management right.36 But even a broad, general request for bargaining "implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable." *Id.* at 5-6.
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> Impact and effects bargaining is not waived, suspended, or "on pause" during an emergency, as suggested by the Agencies' representative.41 The refusal to bargain is an unfair labor practice. It should also be noted that the CMPA states 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."42 The Board is unconvinced by the Agencies' claim of having no time to bargain. Bargaining cannot be postponed until the end of the emergency, at which time the Board's ultimate remedy may be inadequate. The Agencies' posture is incompatible with an effective collective bargaining process. *Id.* at 6.
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> In the instant case, the Agencies' repeated assertions that they have no duty to bargain are clear-cut and flagrant conduct. The Agencies have taken the declaration of an emergency as *carte blanche* to refuse to bargain and to implement unilateral changes. The very serious nature of the COVID-19 pandemic calls for swift and deliberate action, but that does not excuse the Agencies' refusal to participate in collective bargaining. The Agencies' actions seriously interfere with the Board's process. The Board notes that, had the Agencies included the Union in its deliberations, they would likely not be hearing this case. *Id.* at 8.

The Board also noted that, "the health and safety of employees is a mandatory subject of bargaining which must be negotiated." *Id.* at 9. Similarly, in *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections,* Case 20-U-24 (4/6/2020), at 7, motion for reconsideration denied. (5/8/20), the Board held "that the subjects of official time, as well as health and safety conditions of

employment, are mandatory subjects of bargaining and the Agency is not relieved of its duty to bargain because of the pandemic." In that case, also involving a Motion for Preliminary Relief, the Board ordered the agencies unilateral elimination of official time to be restored to the status quo; it ordered the agency to bargain "forthwith" about health and safety during the pandemic; and it also order the agency to bargain with the union concerning the impact and effects of the transition to a 12-hour shift.[5]

In *AFSCME Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, PERB Case 10-U-49(a), 2010, at 5, the Board stated that:

> Management violates its statutory duty to bargain when it implements a management decision in the face of a timely union request to bargain over impact and effects. See *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 D.C. Reg. 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002); *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). Further, the Board has determined that the duty to bargain "extends to matters addressing the impact and effect of management actions on bargaining unit employees as well as procedures concerning how these rights are exercised." *Teamsters, Local 639 and District of Columbia Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263, PERB Case No. 90-N-02 (1991); *AFSCME, Council 20 v. District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining*, 36 D.C. Reg. 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989).

Concerning the Union's allegation of direct dealing, the Board in *Fraternal Order of Police v. D.C. Metro. Police Dept's,* PERB Case 99-U-27 (2001), 3-4, stated the following:

> This Board has issued decisions in cases involving direct dealing; however, it has not decided whether polling employees in the context of these facts constitutes direct dealing. In cases where the Board has considered the issue of direct dealing, it has ruled that "mere communication with membership", "is not violative of the Comprehensive Merit Personnel Act (CMPA)." *AFSCME D.C. Council 20 v. GDC, et. al.,* 36 DCR 427, Slip Op. No. 200, PERB case No. 88-U-32 (1988) cited in *FOP/MPD Labor Committee v. D.C. Metropolitan Police Department,* 47 DCR 1449 (2000) Slip Op. No. 607, PERB Case No. 99-U-44 (1999).[11]
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> In the present case, we believe that MPD's actions went beyond "mere information gathering." Specifically, MPD's actions can be more accurately characterized as seeking employee views on alternate proposals regarding tour of duty and days off schedules. As a result, we conclude that MPD's actions constituted improper polling.
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> Our finding is based on the following two determinations. First, we view MPD's letter and questionnaire as proposals, and not as an information gathering tool. Second, contrary to the Hearing Examiner's finding, we believe that MPD made a decision to

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[5] See, *AFSCME, District Council 20, Locals 1200, 2776, 2401, and 2087 v. D.C. Gov't,* PERB Case 97-U-15A, (1999) at 7, fn. 10, holding that "An employer's unilateral changes in existing negotiable terms and conditions of employment constitute per se violations of the duty to bargain. A violation exists even if it is found that the unilateral changes were made in good faith. See, *NLRB v. Katz,* 369 U.S. 736 (1962)." There, the Board ordered, as part of the remedy, the rescission of the unilateral changes found.

implement changes to the tour of duty and days off schedule.[12] Further, we believe that when management has competing proposals and *decides* that it *needs* input from employees, it *must* go through the employee's exclusive bargaining agent for that input.[13] This is the case even when the subject matter involves a management right that may be implemented without bargaining. In the present case, MPD had competing proposals. However, MPD did not go through the exclusive bargaining agent to get input concerning the proposals. Instead, they elected to contact bargaining unit members directly. In addition, MPD refused to bargain with FOP over the impact and effect of the change. As a result, the Board finds that MPD improperly bypassed the union and committed an unfair labor practice.

In Re El Paso Elec. Co., 355 NLRB 544, 545 (2010), the NLRB stated as to direct dealing that:

> The established criteria for finding that an employer has engaged in unlawful direct dealing are "(1) that the [employer] was communicating directly with union represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union." *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), citing *Southern California Gas Co.*, 316 NLRB 979 (1995).
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> "[A]n employer has a fundamental right ... to communicate with its employees concerning its position in collective-bargaining negotiations," *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), but is obligated "to deal with the employees through the union, and not with the union through the employees." *General Electric Co.*, 150 NLRB 192, 195 (1964). In this case, Hedrick dealt with the Union through Enriquez, thereby undercutting the Union's status as exclusive bargaining representative, in violation of Section 8(a)(5) of the Act.

In *Holly Farms Corp. v. NLRB*, 48 F.3d, 1360, 1368 (4th Cir. 1995), cert. granted in nonpertinent part 515 U.S. 963 (1995), affd. 517 U.S. 392 (1996), the Fourth Circuit stated the following in enforcing an NLRB order:

> An employer's duty to bargain with its union encompasses the obligation to bargain over the following mandatory subjects—"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); see id. § 158(a)(5). That obligation includes a duty to bargain about the "effects" on employees of a management decision that is not itself subject to the bargaining obligation. See *First Nat'l Maintenance Corp. v. NLRB,* 452 U.S. 666, 679-[6]82, 101 S.Ct. 2573, 2581-[25]83, 69 L.Ed.2d 318 (1981); *NLRB v. Litton Fin. Printing Div.,* 893 F.2d 1128, 1133-[11]34 (9th Cir. 1990), rev'd in part on other grounds, 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed. 2d 177 (1991). Where changes in employee working conditions constitute such a bargainable effect, an employer violates § 8(a)(5) and (1) of the Act by implementing those changes without bargaining with the union. See *Litton,* 893 F.2d at 1133-[11]34. The employer also violates § 8(a)(5) and (1) if it negotiates directly with its employees, rather than with their union representative, about such changes. See *EPE,* 845 F.2d at 491.

b. Direct Dealing, the Unilateral Changes, and the Refusal to Bargain

In the instant case, I find for the following reasons that DCPS engaged in unlawful direct dealing with employees and in unlawful unilateral changes by its actions on June 30, when

DCPS sent Union bargaining unit members two documents via email: (1) DCPS Return to In-Person Work Guidelines ("Guidelines"); and (2) DCPS Employee Return to In Person Work Intent Form ("Intent Form"). In this regard, on May 8, Union bargaining unit members met virtually with Ferebee and other DCPS representatives to discuss ideas and recommendations regarding DCPS's plans to reopen schools for in-person learning during the COVID-19 pandemic. On May 9, Davis sent Ferebee an email with a list of 16 items to be discussed as they move forward. Ferebee responded by email dated May 11, thanking Davis for the comprehensive list of issues regarding reopening the schools, but stating that the May 8 meeting was not a contract negotiation session.

Davis testified that the Union created a taskforce on re-opening schools. On June 22, Davis sent DCPS officials a copy of recommendations prepared by the Union's taskforce on reopening DC Schools. Davis invited DCPS officials to attend a briefing by the chairs of the taskforce on June 23, and on June 24, Union taskforce members met virtually with DCPS officials to brief them on the taskforce's recommendations. They met again with DCPS officials, including Ferebee, on June 26 concerning the taskforce's recommendations. Thus, it was readily apparent to DCPS officials that safety concerns relating to in-person opening of the schools was of prime importance to the Union and its bargaining unit employees.

Yet, without warning to the Union, on June 30, DCPS sent Union bargaining unit members two documents via email: (1) DCPS Return to In-Person Work Guidelines ("Guidelines"); and (2) DCPS Employee Return to In Person Work Intent Form ("Intent Form"). DCPS sent the documents via email to Union representatives the same day that they were sent to teachers. The Intent Form gave the employees a July 10, deadline for a signed return, and it gave them two choices with respect to their return to work for in-person teaching. The Intent Form by its terms states that the return relates to employees' health and safety as it states the "in-person return to work date for employees will be determined based on public health data...". The Intent Form did not state the consequences of not filling out the form, as to whether there would be any disciplinary action or status forfeiture for failing to timely comply, and it gave the employees the Hobson's choice of not signing, or electing one of the two alternatives without knowing the consequences of each, that is possibly returning to an unsafe work environment, or the result of their job status if they claimed a "qualifying medical condition." The accompanying Guidelines also contained items relating to employee health and safety such as: whether certain employees could "safely perform their roles" on-site; the wearing of masks and discipline related thereto; the administration of health screenings; the provision of PPE and circumstances related thereto; training on safety protocols; the use of leave and requirements relating to leave pertaining to the pandemic.

Both Davis and Field Representative Catapano testified to concerns raised by teachers to Union officials upon their receipt of the Intent Form. Davis testified, that to her knowledge, DCPS did not directly inform the teachers prior to the July 10 deadline that the teachers were not required to sign the Intent Form. Davis testified that, after the Union expressed concern about the Form having been sent without the Union's knowledge, DCPS informed the Union in writing that staff were not required to complete the Form, and they would not be disciplined for not completing it. DCPS official Powe testified that no member of the Union's bargaining unit has been disciplined for failing to respond to the Intent Form. Powe identified a DCPS response to an information request by the Union, wherein the Union asked if DCPS intended to impose negative consequences on teachers who did not fill out the Intent Form by July 10, or by a later date. As part of DCPS response, it is stated, "Staff will not be disciplined for not completing the intent to return form." Powe testified that DCPS did not communicate this response directly to the teachers. Powe testified that DCPS did not bargain with the Union regarding the Intent Form or

the Guidelines before they sent it to the teachers. DCPS stated in the above referenced response to the Union's request for information page 2, item 6, that "If a staff person does not qualify for an approved leave or is not considered at risk, they will be expected to return to work. Before returning to work, DCPS will provide details on the health and safety measures put in place for a safe and strong reopening."

On July 5, Davis sent Ferebee an email requesting to bargain regarding the Guidelines and the Intent Form stating that to the "extent DCPS may assert that any of the foregoing is a nonnegotiable management right, WTU would dispute that assertion, but DCPS should nevertheless bargain with the WTU over the impact and effects of such decisions. Until the parties have had an opportunity to bargain over these matters, DCPS should withdraw both documents and inform teachers that they need not respond by the July 10 deadline." By email on July 6, Powe, responded by email to Davis' July 5, request to bargain by stating: "As previously discussed, DCPS is willing to engage in impacts and effects bargaining with you concerning reopening. Before we begin bargaining for the reopening, we should meet to discuss initial ground rules."

On July 7, Davis responded to Powe stating that the Union would agree to meet for bargaining on July 9 and further that "I also want to make clear that WTU is not only requesting to bargain over the impacts and effects of reopening, but also regarding DCPS's policies for reopening, which affect the health and safety of WTU members and, per the recently issued Guidelines, impose new discipline on teachers for failure to comply with DCPS policies." Davis stated to Powe that you have refused to indicate whether DCPS will bargain over the Intent Form and Reopening Guidelines, and whether DCPS will rescind those documents pending the completion of negotiations. It was asserted that the negotiations could not be effective while those documents are in effect. Davis stated that the discussion of ground rules on July 9, was unnecessary, that the parties should proceed directly to substantive discussion in view of the July 10, deadline that DCPS has imposed on teachers to complete the Intent Form.

In *AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining,* PERB Case 20-U-23, 2020, at 9, the Board noted that, "the health and safety of employees is a mandatory subject of bargaining which must be negotiated." Similarly, in *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections,* Case 20-U-24 (2020), at 7, the Board held "that the subjects of official time, as well as health and safety conditions of employment, are mandatory subjects of bargaining and the Agency is not relieved of its duty to bargain because of the pandemic." Moreover, as a discussion in those cases reveals, that even if the implementation of a change is a management right, DCPS still had an obligation to bargain about the impact and effects of those changes with the Union prior to their implementation. See also, *Holly Farms Corp. v. NLRB*, 48 F.3d, 1360, 1368 (4th Cir. 1995), cert. granted in nonpertinent part 515 U.S. 963 (1995), affd. 517 U.S. 392 (1996).

Here, DCPS engaged in direct dealing with employees by soliciting alternate options as to their return to work during the pandemic with a fixed deadline; and implemented unilateral changes with respect to its distribution of the Intent Form and Guidelines directly to unit members without first presenting the Union with the opportunity to bargain. Given the parties recent contacts concerning the Union's concerns about safely reopening, DCPS' actions were designed to or had the clearly foreseeable effect of undermining the Union before its membership. These actions were a fait accompli. Nevertheless, the Union requested bargaining after the fact, and the recission of the unilateral changes, which DCPS refused to do. I find by its actions, DCPS violated CMPA as alleged in the complaint.

I do not find cases cited by DCPS concerning the issuance of the June 30, Intent form to require a different result to my conclusion that it involved unlawful direct dealing. For example, in *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. DC Metropolitan Police Department,* Case 09-U-55 (2016), at 4, it was stated:

> The Board has held that "[a]lleged examples of direct dealing must be examined in context to determine whether the agency intended to disparage or undermine the union's leadership."[19] The context here is that no evidence was presented that the Union ever negotiated on behalf of individuals for leave on a particular day or played any role in leave requests. Article 15 of the CBA, entitled "Leave" does not refer to any such role nor does it make any provision for procedures for leave requests. It contains sections on "Funeral Leave" (section 1), "Leave for Convention and Union Functions" (section 2), "Leave for Membership Meetings" (section 3), sick leave (sections 4 and 5), and performance-of-duty injuries (section 6). Article 15 has no provisions on annual leave taken for personal reasons.[20] Rather than being a departure from the norm that could be seen as disparaging, the procedure followed here seems to be the ordinary procedure contemplated by the District Personnel Manual.

In the instant case, the issuance of the Intent Form, was not announced to the Union, although the parties were in the process of meeting regarding the safe re-opening of schools, and DCPS knew that the Union had expressed a clear intent to bargain on these matters. There was no set policy in effect at the time concerning the resumption of in-person work during the pandemic, and the choices presented to employees raised safety concerns, with a fixed deadline of July 10 to choose between two options, without a clear consequence of picking either, or not returning the form at all. I do not find as persuasive DCPS' contention that no employee was disciplined for not returning the form, as the employees had no way of knowing that at the time the form issued, or by the July 10 deadline for its return. Moreover, as set forth above, bypassing the Union with new policies pertaining to health and safety, with new options presented, during a pandemic, could only have the foreseeable effect of undermining the Union amongst its membership.

On July 9, one day after its filing of the complaint with PERB in this matter, the Union presented and discussed with DCPS a written proposed draft "Temporary Memorandum of Agreement during COVID19" (MOA) which detailed proposals that the Union sought to bargain over prior to the reopening of DCPS schools for in-person learning, including issues affecting the health and safety of returning teachers. The MOA states it was drafted by a team of over 200 members and field representatives of the Union.

On July 21, DCPS presented to the Union a draft of its "Reopen Strong COVID-19 Operations Handbook Guidance" for in-person hybrid operations/learning ("Handbook"). In her July 21, email to the Union, Powe stated that the Handbook was "to ensure processes and systems are in place that prioritize the health and safety of all students and staff should health conditions allow for learning at school." In a July 21, email to Powe, Ngwa stated "Can you confirm that DCPS will negotiate with WTU over the terms and conditions reflected in this document before taking any action to implement it?" Powe responded on July 23, stating that "By and large, the Operations Manual reflects the exercise of management's rights, including to determine educational policy and mission as well as to determine internal security controls and protocols to safeguard students and all employees against the spread of COVID 19 in schools with the reopening of in-person school operations. As such, management intends to negotiate

this as part of the impact and effects on reopening."

On July 30, the Mayor announced that DCPS schools would begin the year with all-virtual learning for the first term until at least November 6. On August 6, DCPS sent a tracked changes document to the Union with proposed edits and deletions to the Union's MOA proposals. DCPS also included comment bubbles in the document indicating provisions of the MOA that DCPS asserted were non-negotiable. A general review of the DCPS response to the Union's MOA reveals that most of the Union's 46-page proposals was lined over in the form of a cross-out by DCPS, along with comments along the side.

The Union argues in its brief with citations to the document in which DCPS responded to the Union's MOA, that the health and safety topics that DCPS declared nonnegotiable in the Union's MOA, included: supply of soap, water, paper towels, hand sanitizer, and cleaning supplies; requirements to wear face coverings in schools; COVID-19 testing at schools; health screening procedures; cleaning policies to prevent spread of COVID; social distancing measures, including limits on large gatherings and policies to avoid crowding; the protocol for notifying teachers of a confirmed case of COVID-19 at a school; policies regarding persons with COVID-19 symptoms or who have been exposed to the virus; and communication to teachers, staff, and students regarding preventing spread, including properly washing hands and properly wearing face coverings; ensuring proper ventilation in schools. DCPS' repeated response included statements that each of the particular proposals in the Union's MOA was a non-negotiable management right, as well as in certain instances that DCPS edited the proposed language to be consistent with its Ops Manual Handbook that had been recently tendered to the Union without negotiation.

The Union contends, in its post-hearing brief, that DCPS, by the above-described conduct, has continued to refuse to bargain over health and safety matters for returning teachers in further violation of the CMPA. In this regard, the Union asserts that DCPS refused to negotiate on nearly all of the Union's MOA proposals and declared them non-negotiable. It is asserted that these proposals included some of the most basic protections for the health and safety of teachers during the pandemic. The Union contends its proposals are mandatory subjects of bargaining. The Union contends that in addition to DCPS' actions constituting a refusal to negotiate, DCPS citing its Handbook as another reason further compounds the problem since the Handbook was unilaterally developed by DCPS. The Union seeks a recommended order to the Board that DCPS be ordered to bargain in good faith concerning health and safety matters with the Union.

As set forth above, events taking place July 9, or thereafter, post dated the filing of the complaint in this case. On August 13, the Union filed a "Motion for Leave to File Amended Complaint," along with the "First Amended Unfair Labor Practice Complaint" with PERB. Paragraphs 28 and 29 of the proposed first amended complaint are new and appear to address conduct indicating a continuing refusal to bargain during negotiations subsequent to July 8. On August 20, PERB's Executive Director issued a directive denying the motion to amend the complaint. However, she stated, "In support of its Motion, WTU asserts that the amended complaint would add facts to support allegations of the complaint. WTU will have the opportunity to present facts to support the allegations of the complaint during the hearing. The purpose of a hearing is to develop a full and factual record upon which the Board may make a decision. The Motion is denied."

At the hearing, the parties took the above directive to heart, as they entered a joint stipulation of facts, which included a history beyond the July 8, filing of the complaint all the way

through August 20. The stipulation of facts included: the Union's July 9 presentation of its 46 page MOA to DCPS; DCPS July 21, presentation of its draft Covid-19 Operations Handbook to the Union; and DCPS August 6, tracked changes, proposed edits, deletions, and comments regarding the Union's MOA. Moreover, extensive testimony was drawn from the Union's witnesses as to the formulation and presentation of the MOA, and concerns regarding DCPS response to thereto. In this regard, DCPS witness Powe testified that it remained DCPS position that for all of the items in the Union's MOA that DCPS marked as non-negotiable on August 6, that DCPS continues to assert that those items are non-negotiable.

In its post-hearing brief, DCPS cites the Mayor's declaration of a public health emergency on March 11, as well as the emergency powers granted to the Mayor by the Council of the District of Columbia. It was noted that on March 13, that DCPS would modify school operations on March 16 to April 1 for distance learning. It was stated that distance learning was scheduled to take place from March 24 to March 31. On March 20, it was announced that the initial return date of April 1 to in-person learning was postponed, and that distance learning would continue to April 24 with in person learning scheduled to resume on April 27. On April 17, it was announced that distance learning would continue for the remainder of the school year ending on May 29. It was pointed out in DCPS brief DCPS efforts made in seeking input information pertaining to the safe opening of schools, with the Union amongst those sources. It is stated that safety and data points from where they are derived "is simply not a matter governed by collective bargaining." It was pointed out that on July 30, that the Mayor announced that DCPS schools would begin the 2020-2021 school year with all virtual learning.

DCPS cites in its brief various DC Code provisions and Mayor's Orders which on their face would not appear to disturb the Board's rulings in *AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining,* PERB Case 20-U-23, (3/31/2020), at 1, Motion for Reconsideration denied. (5/8/20); and in in *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections,* PERB Case No. 20-U-24 (4/6/2020), at 7, Motion for Reconsideration denied. (5/8/20) that bargaining over health and safety was a mandatory subject of bargaining during the pandemic. Some of the cited code provisions, in fact, were in effect prior to the time the Board's decisions issued. Moreover, arguments that the Board erred in those decisions is a matter for DCPS to take up with the Board.

DCPS also cites multiple cases contending that its actions were encompassed by management rights; and it argues in the alternative that it engaged in good faith impact and effects bargaining However, as set forth above, the Board has determined that bargaining about health and safety during the pandemic constitutes a mandatory subject of bargaining; and given DCPS uniform declaration of management rights, I do not find that it engaged in good faith impact and effects bargaining. This is particularly so since it ignored the Union's request to rescind the Intent Form and Guide as a prelude to good faith bargaining.

DCPS asserts that is obligation to bargain can only be decided by way of a negotiability appeal. However, in *Teamsters v. DCPS,* PERB Case 89-U-17 (1990), at fn. 4, the Board stated "We similarly reject DCPS's contention that the only way to raise issues concerning the negotiability of a subject matter is through a negotiability appeal. Such determinations may also be made in unfair labor practice proceedings as is the case herein." (Case citations omitted.) This is particularly apt in the instant case involving allegations of direct dealing and unilateral changes.

In sum, as set forth above, in *AFGE, Local 631 v. D.C. Office of Labor Relations & Collective Bargaining,* PERB Case 20-U-23, at 9 (3/31/2020), a case involving the pandemic, the Board stated that, "the health and safety of employees is a mandatory subject of bargaining which must be negotiated." The Board further stated:

> In the instant case, the Agencies' repeated assertions that they have no duty to bargain are clear-cut and flagrant conduct. The Agencies have taken the declaration of an emergency as *carte blanche* to refuse to bargain and to implement unilateral changes. The very serious nature of the COVID-19 pandemic calls for swift and deliberate action, but that does not excuse the Agencies' refusal to participate in collective bargaining. The Agencies' actions seriously interfere with the Board's process. The Board notes that, had the Agencies included the Union in its deliberations, they would likely not be hearing this case. *Id.* at 8.

Here, although DCPS had been meeting with the Union concerning operations during the pandemic, on June 30, unbeknownst to the Union it sent the Intent Form and Guide out directly to bargaining unit members, and as the testimony reveals such action raised concerns amongst those employees. In the circumstances here, I have found DCPS actions to constitute direct dealing and unilateral actions which served to undercut the Union with its membership. While DCPS asserts its actions were warranted by the exigencies of the pandemic, it postponed opening the schools to in-person learning on several occasions; and it also as it reports in its brief consulted numerous sources in formulating its pandemic action plan. Thus, DCPS repeatedly postponed in-person re-opening and had time to consult multiple sources. It asserts it just did not have time to bargain in good faith with the Union concerning safety and health of the teachers concerning the pandemic, an assertion I reject for the reasons stated. Along these lines, DCPS and the Union were able to reach an understanding through an MOA on distance learning. As stated up above, had DCPS bargained with the Union in good faith concerning health and safety regarding the pandemic, it is not likely that the Board "would be hearing this case." Accordingly, I find violations of the CMPA as alleged in the complaint.

Conclusions of Law

1. DCPS is an employer and is subject to the jurisdiction of PERB in accordance with D.C. Code Section 1-602.01
2. The Union is a labor organization and is subject to the jurisdiction of PERB in accordance with D.C. Code Section 1-617.03
3. By engaging in direct dealing with the Union's bargaining unit members and implementing unilateral changes to terms and conditions of employment for those employees relating to health and safety by the issuance of its June 30, 2020, Intent Form to employees and its Guidelines DCPS has violated D.C. Code Sections 1-617.04(a)(1) and (5).

Remedy

Having found that DCPS engaged in certain unfair labor practices, I shall issue a recommended order that they cease and desist and to take certain affirmative action designed to effectuate the policies of the CMPA.

RECOMMENDED ORDER

DCPS, its officers, agents, attorneys, successors and assigns shall:

1. Cease and desist from refusing to bargain in good faith with the Union concerning health and safety during the pandemic.
2. Cease and desist from implementing changes in employment pertaining to health and safety without fulfilling its bargaining obligation with the Union, and/or engage in direct dealing with employees concerning health and safety in a manner which will serve to undermine the Union.
3. Cease and desist in any like or related manner in interfering with, restraining or coercing employees in their rights guaranteed them under D.C. Code Sec. 1-617.04 (a)(1) and (a)(5).
4. DCPS shall negotiate in good faith with the Union forthwith, upon request, about health and safety issues concerning the pandemic.
5. DCPS shall retract in writing to employees the Intent Form and Guidelines issued to bargaining unit employees on around June 30, 2020, and notify the Union in writing that this has been done.
6. Within 14 days after service by the PERB, post at its facilities in Washington, D.C. copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the PERB, after being signed by a DCPS authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to bargaining unit employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if DCPS customarily communicates with their employees by such means. *Picini Flooring,* 356 NLRB No.9 (2010) and *U.S. DOJ, FED, BOP, Transfer CTR, OKLA. City, OKLA,* 67 FLRA 221 (2014). Reasonable steps shall be taken by DCPS to ensure that the posted notices are not altered, defaced, or covered by any other material.
7. Within 21 days after service by the PERB, file with the PERB sworn certification of a responsible official attesting to the steps that DCPS has taken to comply.

Dated, Washington, D.C. October 19, 2020

Eric M. Fine

Eric M. Fine
Hearing Examiner

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
Public Employee Relations Board
An Agency of the District of Columbia

The Public Employees Relations Board has found that we violated the Comprehensive Management Personnel Act and has ordered us to post, mail, and obey this notice.

DISTRICT OF COLUMBIA LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected rights.

WE WILL NOT refuse to bargain with the Washington Teachers Union, Local #6, American Federation of Teachers, AFL-CIO, (the Union) for employees in bargaining units in which the Union is the certified representative regarding health and safety during the pandemic.
WE WILL NOT implement changes in employment pertaining to health and safety without fulfilling our bargaining obligation with the Union, and/or engage in direct dealing with employees concerning health and safety in a manner which will serve to undermine the Union.
WE WILL NOT engage in any like or related conduct which interferes with, restrains or coerces employees in their rights guaranteed them under D.C. Code Sec. 1-617.04 (a)(1) and (a) (5).
WE WILL bargain with the Union forthwith in good faith, upon request, about health and safety issues concerning the pandemic.
WE WILL promptly retract in writing to employees the Intent Form and Guidelines issued to bargaining unit employees on around June 30, 2020, and notify the Union in writing that this has been done.

DISTRICT OF COLUMBIA PUBLIC SCHOOLS
Employer

Date: _____ By _____
Representative Title

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served to the following parties on this the 2nd day of November 2020:

Via File & ServeXpress

Lee W. Jackson
James & Hoffman, P.C.
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Washington, D.C. 20036

Stephanie T. Maltz
District of Columbia
Office of Labor Relations and Collective Bargaining
441 4th Street NW, Suite 820 North
Washington, D.C. 20001

/s/ Royale Simms
Public Employee Relations Board