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

In the Matter of)	
)	
American Federation of Government)	
Employees, AFL-CIO, Local 631)	
)	PERB Case No. 20-U-23
Complainant)	
)	Opinion No. 1768
v.)	
)	
District of Columbia Office of)	
Labor Relations and Collective)	
Bargaining, <i>et al.</i>)	
)	
Respondents)	

DECISION AND ORDER

I. Statement of the Case

On March 31, 2020, the American Federation of Government Employees, AFL-CIO, Local 631 (Union) filed an Unfair Labor Practice Complaint (Complaint) against the Office of Labor Relations and Collective Bargaining (OLRCB), the Department of Public Works (DPW), the Department of General Services, the Office of Planning, the Office of Zoning, the Office of Contracting and Procurement, and the Department of Environment and Energy (collectively, Agencies). The Union alleged violations of D.C. Official Code §§ 1-617.04 (a)(1) and (5), and 1-617.11(a) of the Comprehensive Merit Personnel Act (CMPA) and the parties' Working Conditions Agreement, Article 4.¹ The Union asserted that the Agencies refused to negotiate with the Union over changes in working conditions precipitated by the coronavirus pandemic, violated the Union's right as the exclusive representative, and violated the Mayor's Administrative Order on preventing the spread of the coronavirus.² Among other remedies, the Union requested reimbursement of costs and attorney fees, information regarding bargaining unit employees diagnosed with and exposed to COVID-19, and an order directing the Agencies to bargain with the Union on the coronavirus pandemic.³

¹ Complaint at 1.
² Complaint at 1,4.
³ Complaint at 7-8.

The Union also sought several forms of preliminary relief including the ability for eligible employees to telework until the end of the coronavirus pandemic, information concerning all changes made to working conditions at each agency, and access to mandated protective equipment for employees required to work in hazardous areas.⁴

On April 20, 2020, the Agencies filed an Answer to the Complaint. The next day, they filed an Amended Answer which included a few minor corrections and raised several affirmative defenses.⁵ On April 24, 2020, the Board issued PERB Opinion No. 1743 which granted, in part, the Union's requests for preliminary relief. The Board ordered DPW to bargain over the impact and effects of lengthened work shifts and directed the Agencies to provide the relevant requested information to the Union.⁶

A Hearing was held on June 23, 2020. In its closing brief, the Union claimed that the Agencies repudiated the Parties' CBA by unilaterally changing the employees' working conditions without bargaining with the Union.⁷ The Agencies countered that claim in their post-hearing brief.⁸ The Hearing Examiner issued his Report and Recommendations (Report) on November 19, 2020. The Hearing Examiner found that the Agencies violated D.C. Official Code § 1-617.04 (a)(1) and (5) when they refused to bargain over emergency working conditions, to include the impact and effects of changes to working conditions following the Mayor's Administrative Order on Preventing the Spread of Coronavirus.⁹ He found that the Agencies did not repudiate the CBA when they unilaterally implemented the changes in working conditions.¹⁰ The Parties did not file any Exceptions.

The Board adopts the Hearing Examiner's Report and Recommendations finding that the Agencies violated D.C. Official Code § 1-617.04(a)(1) and (5).

⁴ Complaint at 6.

⁵ The Amended Answer raised the affirmative defense that the Complaint was deficient because it failed to state the name, address, and telephone number of the Respondents, as required by PERB Rule 520.3(b). Amended Answer at 5. As a second affirmative defense, the Agencies argued that the Complainant had failed to plead facts sufficient to establish that the Agencies had committed an unfair labor practice. *Id.* at 5,8. They asserted that, under the standard set forth in *Ulysses S. Goodline v. Fraternal Order of Police/Department of Corrections Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996), the Complaint was deficient, as it did not "[allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]." Amended Answer at 5,6. Third, the Answer raised the affirmative defense that the Complainant was not entitled to attorney fees because, until the Board's recent decision in PERB Case No. 18-U-01, longstanding precedent held that the Board did not have authority to award attorney fees. Amended Answer at 8. *See International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No.91-U-14 (1992); *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. 272, PERB Case No. 90-U-10 (1991).

The Agencies noted that the recent decision is in the appeals process and argued that it should not be applied unless and until it is upheld on appeal. Amended Answer at 8.

⁶ Opinion No. 1743, p. 9.

⁷ Closing Brief at 1.

⁸ Post-Hearing Brief at 10.

⁹ Report at 11.

¹⁰ Report at 11.

II. Hearing Examiner's Report and Recommendations

A. Hearing Examiner's Findings

The Mayor of the District of Columbia issued an Executive Order on March 11, 2020, declaring a state of emergency due to the coronavirus. 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. Among those personnel powers are the abilities to modify employee tours of duty, extend shifts, and assign additional shifts.¹¹ The Mayor can do these things despite "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."¹²

On March 16, 2020, the Union emailed the Agencies' representative, asking to bargain.¹³ The same day, OLRCB responded by asking for clarification, stating that the coronavirus is not a "term and condition of employment" and the virus' "effect on the terms and conditions of employment" is extremely vague and overbroad."¹⁴ On March 18, 2020, the Union demanded to "bargain over the coronavirus (COVID-19) and its effect on the terms and condition [*sic*] of employment for employees [the Union] represent[s] throughout the DC government."¹⁵

DPW, in particular, initiated changes in working conditions under the COVID-19 Emergency Act, requiring some employees to transition to a 10-hour shift.¹⁶ When the Union requested documentation authorizing DPW to unilaterally change work schedules, OLRCB referred to the COVID-19 Emergency Act and D.C. Official Code § 1-617.08(a)(6) and stated ". . . the law does indeed allow for a change and modification of shifts without substantive bargaining with the union in this unprecedented and extraordinary situation."¹⁷

B. Hearing Examiner's Recommendations

The Hearing Examiner concluded that the current state of emergency does not give Agencies *carte blanche* to refuse to bargain and to implement unilateral changes.¹⁸ He determined that the Union in this matter met its burden of showing, by a preponderance of the evidence, that the Agencies violated D.C. Official Code § 1-617.04(a)(1) and (5) when they refused to bargain over changes to the emergency working conditions, to include impact and effects.¹⁹ The Hearing

¹¹ COVID-19 RESPONSE EMERGENCY AMENDMENT ACT OF 2020, 2020 District of Columbia Laws Act 23-247.

¹² *Id.*

¹³ Report at 8.

¹⁴ Report at 8.

¹⁵ Report at 8.

¹⁶ Report at 5.

¹⁷ Report at 5. (Citations omitted). (Opinion No. 1743, p. 2-3)

¹⁸ Report at 11.

¹⁹ Report at 10-11.

Examiner did not, however, find that the Agencies' actions constituted a repudiation of the Parties' collective bargaining agreement.²⁰

The Hearing Examiner recommended that the Board require the Agencies to (1) reimburse the Union's costs; (2) cease and desist from interfering in the rights of bargaining unit employees guaranteed by D.C. Official Code § 1-617.04(a)(1) and (5); (3) cease and desist from refusing to bargain with the Union over emergency working conditions and charges, including impact and effects; and (4) post a notice.²¹ The Hearing Examiner did not recommend that the Board require Agencies to reimburse the Union for attorney fees.²² In this regard, he did not find any record evidence that the bargaining unit employees were "affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of all or any part of the pay, allowances, or differential of the employee[s]," as required by the Federal Backpay Act.²³

III. Discussion

Under Board Rule 520.11, "[t]he party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."²⁴ The Board will adopt a Hearing Examiner's Report and Recommendations if they are reasonable, supported by the record, and consistent with Board precedent.²⁵

A. Unilateral Implementation of Emergency Changes

The Union asserts that the Agencies violated the CMPA and the parties' Working Conditions Agreement, Article 4, when they refused to negotiate with the Union over the change in working conditions caused by the coronavirus pandemic.²⁶ The Agencies contend that the COVID-19 Emergency Act allows the Mayor to modify tours of duty and D.C. Official Code § 1-617.08(a)(6) gives management "the right [t]o take whatever actions may be necessary to carry out the mission of the District government in an emergency situation."²⁷ The issue of whether the Agencies may unilaterally implement emergency changes is before the Board.

In PERB Opinion No. 1743, the Board held that, under the COVID-19 Emergency Act, DPW's decision to transition employees to a 10-hour shift was a nonnegotiable management right.²⁸ However, it also held that the Union has the right to bargain over the impact and effects of

²⁰ Report at 11.

²¹ Report at 12.

²² Report at 11.

²³ 5 USC § 5596(b)(1).

²⁴ *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018). See *Council of Sch. Officers, Local 4 v. DCPS*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010).

²⁵ *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).

²⁶ Complaint at 1.

²⁷ Amended Answer at 6-7.

²⁸ *AFGE, Local 631 v. OLRCB, et al.*, Slip Op. No. 1743 at 5-6, PERB Case No. 20-U-23 (2020) (granting preliminary relief in the matter at hand).

such a decision if it makes a timely request to do so.²⁹ Agencies do not have a right to postpone such bargaining due to alleged lack of time.³⁰ If such a postponement were allowed, the bargaining might occur at the end of the emergency, at which time the Board's ultimate remedy could be inadequate.³¹ The Board also found that neither the CMPA nor the COVID-19 Emergency Act limits the Agencies' obligation to furnish requested information.³²

The Hearing Examiner concluded that the Agencies violated D.C. Official Code § 1-617.04(a)(1) and (5) when they refused to bargain over emergency working conditions changes, to include impact and effects, following the Mayor's Administrative Order on Preventing the Spread of Coronavirus.³³ The Board finds that the Hearing Examiner's conclusions are reasonable, supported by the record, and consistent with Board precedent.³⁴

B. Reimbursement of Costs

The Union requests an award of \$1,246.20 in costs.³⁵ The issue of whether the Union is entitled to costs is before the Board. D.C. Official Code § 1-617.13(d) states that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." Because he found that the Agencies' "actions were wholly without merit and [their] refusal to bargain was founded on irrational theories," the Hearing Examiner concluded that the payment of the Union's costs by the Agencies was in the interest of justice.³⁶ The Board adopts the Hearing Examiner's conclusions regarding the Agencies' actions, as his conclusions are reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's conclusion that the Agencies should pay the Union's costs.

C. Reimbursement of Attorney Fees

The Union requests attorney fees in accordance with the Federal Back Pay Act, 5 USC § 5596, *et seq.* (Back Pay Act).³⁷ The issue of whether the Union is entitled to attorney fees under the Back Pay Act is before the Board. In PERB Case No. 18-U-01, the Board held that, "[t]he Back Pay Act provides attorney fees to employees as a remedy for the successful litigation of a grievance or unfair labor practice complaint resulting from the appeal of an unjustified or unwarranted personnel action resulting in back pay."³⁸ Here, the Agencies' refusal to bargain over emergency working conditions changes (and the impact and effects of those changes) did not result in a

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*, p.7.

³³ Report at 11-12.

³⁴ *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).

³⁵ Report at 9-10.

³⁶ Report at 11.

³⁷ Report at 11.

³⁸ *Fraternal Order of Police/Protective Services Div. Labor Comm. v. D.C. Dep't of General Services*, Slip Op. No. 1739 at 10,14, PERB Case No. 18-U-01 (2020).

withdrawal or reduction in pay, allowances, or differentials of the effected employees.³⁹ Therefore, the Board adopts the Hearing Examiner's conclusion⁴⁰ that the Agencies do not have to pay the Union's attorney fees.

IV. Conclusion

The Board finds that the Hearing Examiner's Report and Recommendations are reasonable, supported by the record, and consistent with Board precedent. The Board concludes that the Agencies refused to bargain over the impact and effects of changes to working conditions following the Mayor's Administrative Order on Preventing the Spread of Coronavirus, in violation of D.C. Official Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act. The Board orders the Agencies to pay the Union's costs but finds that it is not authorized to award attorney fees under the Back Pay Act and the CMPA.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Agencies shall cease and desist from interfering with, restraining or coercing in any like or related manner, employees represented by AFGE, Local 621 in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act (CMPA), D.C. Official Code § 1-617.04(a)(1) and (5).
2. The Agencies shall cease and desist from refusing to bargain, upon request and to the extent required by law, with the AFGE, Local 631 over emergency working conditions changes, to include impact and effects of emergency working conditions changes.
3. The Agencies shall reimburse AFGE, Local 631 \$1,246.20, which constitutes reasonable costs pursuant to D.C. Official Code § 1-617.13(d). The District of Columbia Public Employee Relations Board shall retain jurisdiction to resolve any disputes arising over the implementation of this part of the remedy.
4. Within ten (10) days from service of this Decision and Order, the Agencies must post a Notice regarding its violations of the CMPA and consistent with the Board's Order. The Agencies shall post the 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.

³⁹ The Back Pay Act authorizes the award of back pay in situations where (1) an employee was affected by an unjustified or unwarranted personnel action; (2) the unjustified or unwarranted personnel action resulted in a withdrawal or reduction in the pay, allowances, or differentials of the employee; and (3) the withdrawal or reduction would not have occurred but for the unjustified action. *Fed. Aviation Admin., Washington, D.C. & Prof'l Airways Sys. Specialists, MEBA*, 27 FLRA 230, 234-35 (May 29, 1987).

⁴⁰ Report at 11.

5. The Notice must remain posted conspicuously on all bulletin boards and electronic distribution platforms and places where notices to employees and bargaining unit employees are customarily posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.
6. The Agencies shall notify the District of Columbia Public Employee Relations Board in writing within fourteen (14) days of the issuance of the Decision and Order, that the Notice has been posted as ordered.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

January 29, 2021
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 20-U-23, Op. No. 1768 was sent by File and ServeXpress to the following parties on this the 3rd day of February 2021.

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