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

In the Matter of:)	
)	
American Federation of Government Employees, Local 1000,)	
)	PERB Case No. 13-U-07
Complainant,)	
)	Opinion No. 1434
v.)	
)	
District of Columbia)	
Department of Employment Services,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 1000 ("Union," "AFGE," or "Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondent District of Columbia Department of Employment Services ("Agency," "DOES," or "Respondent") for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act ("CMPA"). Specifically, the Union asserts that the Agency unilaterally implemented a new dress code policy without taking steps to bargain with the Union over the implementation or impact and effects of the policy. (Complaint at ¶ 6-7). Respondent filed an Answer and Affirmative Defenses ("Answer") in which it denies the alleged violations and raises the following affirmative defenses:

- (1) The establishment and implementation of a dress code policy falls squarely within the statutory management right "to direct employees of the agencies" in D.C. Code § 1-617.08(a)(1);
- (2) Article 25 of the parties' collective bargaining agreement ("CBA") recognizes the management right "to direct the employees of the Department"; and
- (3) Identification and safety are two of the objectives of the dress code policy, which fall within the sole management right "to determine the agency's internal security practices" under D.C. Code § 1-617.08(a)(5)(D).

(Answer at 3). On August 15, 2013, the Union filed a Motion for Decision on the Pleadings (“Motion”), asserting that the issue in this case is well-settled under federal labor law, and requesting the Board issue a decision on the pleadings in accordance with federal labor law precedent. (Motion at 2).

II. Discussion

A. Facts

AFGE alleges that on or about October 12, 2012, the Agency announced the implementation of a dress code policy, called Administrative Issuance No. 701, to be fully implemented within thirty (30) days. (Complaint at ¶ 4). The policy stated that “DOES employees who violated any of these policies and procedures will be disciplined.” *Id.* The Agency does not dispute this allegation, but contends that the policy was stated to be effective and implemented immediately, and that “Administrative Issuance No. 701 is a revision of Dress Standards Policy dated August 23, 1999, as stated in the Transmittal Letter attached to the Issuance.” (Answer at 2). On October 14, 2012, AFGE demanded to bargain with the Agency over the dress code policy. (Complaint at ¶ 5; Answer at 2). The Union asserts that the Agency did not take any steps to bargain over the decision to implement the policy, nor has it taken any steps to bargain over the impact and effects of the policy. (Complaint at ¶ 6). The Agency denies this allegation, stating that the parties met for impact and effects bargaining on October 24, 2012. (Answer at 2). Further, the Agency admits that it took no steps to bargain with the Union over the decision to implement the policy, and contends that it had no legal obligation to do so. *Id.* AFGE alleges that the Agency has “unilaterally implemented the new dress code policy.” (Complaint at ¶ 7). The Agency denies that it has implemented the new policy, but admits that it unilaterally implemented the revised dress code policy. (Answer at 2; emphasis added). AFGE contends that it has been a long-standing practice that employees were not held to any particular dress code, and were not disciplined for their attire or appearance, which the Agency denies. (Complaint at ¶ 8; Answer at 3).

B. Pleadings

a) Complaint and Answer

In its Complaint, AFGE alleges that the Agency violated D.C. Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a new dress code policy, where it had been a long-standing past practice at the Agency that employees were not held to any particular dress code and were not disciplined for their attire or appearance. (Complaint at ¶¶ 7-8). AFGE notes that while the Board has never addressed this issue, the National Labor Relations Board (“NLRB”) has long held that the implementation of a dress code or any material change to an existing dress code is a mandatory subject of bargaining. (Complaint at ¶ 9 fn 1; citing *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25 (2011); *Crittendon Hospital*, 342 NLRB 686 (2004); *Concord Docu-Prep, Inc.*, 207 NLRB 981 (1973)).

In its Answer, the Agency asserts that the establishment and implementation of a dress code policy “falls squarely within the statutory management right” to direct employees of the agency and determine the agency’s internal security practices. (Answer at 3; *citing* D.C. Code §§ 1-617.08(a)(1) and (a)(5)(D)). Further, the Agency contends that Article 25 of the parties’ CBA recognizes the management right “to direct employees of the Department.” (Answer at 3).

b) Union’s Motion for Decision on the Pleadings

Although titled a “Motion for Decision on the Pleadings,” AFGE’s Motion functions more like a reply to the Agency’s Answer, and serves to flesh out the sparsely-pled Complaint. In its Motion, AFGE responds to the Agency’s claim that the implementation of the dress code was a management right by asserting that “by imposing the new dress code without bargaining with the Union, the Agency has implemented a unilateral change to a mandatory subject of bargaining.” (Motion at 1). Further, the Union states that the “novel issue now before the [Board] is whether the implementation of a dress code is a mandatory subject of bargaining.” *Id.*

In its Answer, the Agency states that the dress code policy is not a new policy, but rather a revised policy which supplanted one previously issued in August 1999. (Answer at 2). In the Motion, the Union contends that the Agency’s position is “in direct conflict to the emphatic denials of the existence of any policy by the Agency’s Director Lisa Mallory and its Labor Relations Advisor Rahsaan Coefield in a series of emails to the Union in February of 2012.” (Motion at 2-3; Motion Ex. 2). In these e-mails, Labor Relations Advisor Coefield states that “the Department of Employment Services has not adopted a Dress Standard Policy,” and “The Department of Employment Services is not enforcing a Dress Standard Policy.” (Motion at 3; Motion Ex. 2). Director Mallory wrote: “We do not have a dress standard policy at DOES,” and later that “The Department of Employment Services has not adopted and is not enforcing a dress standard policy,” reiterating in the same e-mail, “Again, DOES does not have and is not enforcing a dress standard policy. Assertions to the contrary are inaccurate. Accordingly, I cannot provide a cancellation date for a policy that was never enforced.” *Id.*

In its Motion, AFGE acknowledges that the parties dispute whether the implementation of a dress code is a mandatory subject of bargaining. (Motion at 5). AFGE states that while the Board has not yet ruled on this issue, other labor relations authorities have concluded that the decision to impose or materially change a dress code is a mandatory subject of bargaining, and urges the Board to reach the same conclusion. *Id.* Further, AFGE contends that “[b]ecause the facts are not in dispute and the parties’ disagreement represents a question of law, the Union seeks a decision on the pleadings.” *Id.*

C. Analysis

Board Rule 520.10 provides that “[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument.” Where the parties dispute material issues of fact, a decision on the pleadings is not appropriate. *See D.C. Nurses Association v. D.C. Dep’t of Youth Rehabilitation Services*, 59 D.C. Reg. 12638, Slip Op. No. 1304, PERB Case No. 10-U-35 (2012). In the

instant case, the parties dispute whether the Agency had previously adhered to a dress code, or whether Administrative Issuance No. 701 constituted a new dress code policy. (Complaint at ¶¶ 7-8; Answer at 2-3). Additionally, the parties dispute whether impact and effects bargaining took place. (Complaint at ¶ 6; Answer at 2).

In its Motion, AFGE contends that the question of law – whether the implementation of a dress code is a mandatory subject of bargaining or a management right – supersedes the parties' factual disputes in this case. (Motion at 5). As AFGE correctly points out, the Board has not previously decided whether the decision to impose or materially change a dress code is a mandatory subject of bargaining. *Id.* AFGE urges the Board to look to decisions from the FLRA, the NLRB, and state labor boards in reaching its decision. *Id.*

AFGE first cites to two NLRB cases, *Medco Health Solutions of Las Vegas*, 357 NLRB No. 25 (2011), *aff'd in relevant part Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710 (D.C. Cir. 2012), and *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 811 (2004). (Motion at 5). While it is true that the Board looks to the NLRB for guidance when it lacks precedent on an issue, *see American Federation of Government Employees, Local 2714 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 8, PERB Case No. 00-U-22 (2002), such consideration is inappropriate in the instant matter because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights. AFGE recognizes this disconnect in its Motion, and urges the Board to consider precedent from the FLRA, whose governing statute provides a statutory reservation of management rights similar to that of the CMPA. (Motion at 5-6). In support of this argument, AFGE cites to *Veterans' Administration, West Los Angeles Medical Center*, 23 FLRA 278 (1986), and *U.S. Army, Aberdeen Proving Ground, Aberdeen, Maryland*, 32 FLRA 200 (1988). (Motion at 6).

In *Veterans' Administration*, an administrative law judge found, and the FLRA upheld, that while the FLRA has not decided whether or not dress codes are substantively negotiable, changes to a discretionary past practice of employee dress must be negotiated. 23 FLRA at 296. In that case, the existing dress code did not contain a prohibition against wearing sweaters or jackets with employee uniforms, and the FLRA ruled that the employer committed an unfair labor practice by eliminating the past practice of permitting sweaters and jackets without first notifying the Union or bargaining on the matter. *Id.* at 297. Further, the administrative law judge distinguished FLRA cases concerning uniforms for civilian military technicians, which “constitute a method and means of performing work because the employees belong to a military organization which is theoretically subject to mobilization at any time,” and are not “aids to the comfort, health, or safety of the guard employees.” *Id.* at 298. The judge went on to state that even assuming that dress constituted a “method and means” of performing cleaning work for the Veterans' Administration employees, in unilaterally changing the dress code, the employer failed to meet its obligation to bargain concerning the impact of the change. *Id.* While this case supports AFGE's assertion that changes to past practices must be bargained over, it does not conclusively support the contention that employee dress codes are mandatory subjects of bargaining.

In *U.S. Army*, the FLRA considered a union proposal to permit employees to wear shorts in certain areas of the workplace “so long as no detriment results to the employee and no safety health hazards [are] involved.” 32 FLRA at 202. The employer alleged that the union’s proposal was inconsistent with its right to assign work under the Federal Labor Relations Act because safety and health considerations would prevent the assignment of certain duties to employees who were not wearing long pants. *Id.* at 203. The FLRA rejected the employer’s contention that the union’s proposal interfered with its right to assign work, stating that the proposal contained no express requirement that specific work assignments be made or discontinued, and accommodated the employer’s health and safety concerns. *Id.* at 203. Further, the union’s proposal did not insulate employees from the consequences of being improperly attired to perform assigned work. *Id.* at 204. The FLRA similarly rejected the employer’s contention that the union’s proposal interfered with its right to determine its internal security practices, noting that the proposal permitted employees to wear shorts only in areas where non-hazardous materials are used and no health or safety hazards were involved. *Id.* at 204-205. The proposal was determined to be negotiable. *Id.* at 205. The FLRA’s holding in *U.S. Army* illustrates that certain dress code proposals may be negotiable, but falls short of providing definitive support that dress codes are mandatory subjects of bargaining.

While the Agency urges the Board to determine whether the decision to impose or materially change a dress codes is a mandatory subject of bargaining, the Board finds that such an analysis is premature here as it is clear on the evidence presented there is a live dispute as to whether the Agency’s dress code policy is an ongoing past practice. The Board has long held that an agency may not make unilateral changes to past practices without first engaging in the bargaining process. *See Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. D.C. Metropolitan Police Dep’t*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 18, PERB Case Nos. 09-U-52 and 09-U-53 (2013); *American Federation of Government Employees, Local 2978 v. D.C. Dep’t of Health*, 59 D.C. Reg. 10736, Slip Op. No. 1275 at p. 2, PERB Case No. 11-U-21 (2012); *Fraternal Order of Police/Dep’t of Corrections Labor Committee v. D.C. Dep’t of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679 at p. 5, PERB Case Nos. 00-U-36 and 00-U-40 (2002); *University of the District of Columbia Faculty Ass’n/NEA v. University of the District of Columbia*, 43 D.C. Reg. 5594, Slip Op. No. 387 at p. 2, PERB Case Nos. 93-U-22 and 93-U-23 (1996). In the instant case, AFGE asserts that the dress code policy is a new policy, and that the Agency has a “long-standing past practice that employees were not held to any particular dress code and were not disciplined for their attire or appearance.” (Complaint at ¶ 8; Motion at 2-3; Motion Ex. 2). The Agency disputes that a past practice existed, and asserts that Administrative Issuance No. 701 is a revision of an August 1999 policy. (Answer at 2). In light of this dispute of material fact, a decision on the pleadings is not appropriate. *See Board Rule 520.10*. Instead, this matter will be processed through an unfair labor practice hearing to determine whether a past practice existed in which employees were not held to any particular dress code, and were not disciplined for their attire or appearance.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 1000's Unfair Labor Practice Complaint will be referred to a hearing examiner for an unfair labor practice hearing.
2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-07 was transmitted via File & ServeXpress to the following parties on this the 31st day of October, 2013.

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