GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
FRATERNAL ORDER OF POLICE/ METROPOLITAN POLICE DEPARTMENT LABOR COMMITTEE,	PERB Case No. 99-U-27
	Opinion No. 649
Complainant,	
v.	
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,	
Respondent.	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the Fraternal Order of Police/ Metropolitan Police Labor Committee ("Complainant" or "FOP") alleging that the District of Columbia Metropolitan Police Department ("Respondent" or "MPD") violated D.C. Code §1-618.4 (a)(1) and(5). Specifically, it is alleged that MPD committed an unfair labor practice by: (a) dealing directly with bargaining unit members[1] ;and (b) refusing to bargain with FOP concerning proposed changes to the terms and conditions of employment.

The Respondent denied the allegation. Relying on the Management Rights provisions of the collective bargaining agreement (CBA) and the Comprehensive Merit Personnel Act (CMPA), MPD asserts that it is authorized to poll members regarding scheduling issues such as tour of duty and days

[1] FOP claims that MPD circumvented the union by asking bargaining unit members to vote concerning changes in the tour of duty and days off.

off.[2]

After holding a hearing, the Hearing Examiner found that MPD did not violate D.C. Code §1-618.4 and recommended that the complaint be dismissed. The Hearing Examiner's Report and Recommendation and the parties' exceptions and opposition are before the Board for disposition.

I. Background:

On May 3, 1999, Chief of Police Charles H. Ramsey issued a letter to "all sworn members the rank of captain and below" notifying them that MPD intended to "standardize the tour of duty and days off schedule for the seven police districts." The letter indicated that this change would take affect in June and was being considered "to ensure that the work schedule and allocation of the sworn members...matches the distribution of the workload and the needs of the community...". (Ex. J-2, R &R at p.4). In his letter, Ramsey proposed adding a fourth tour of duty and changing from fixed days off to rotating days off. An "official ballot" was attached to the letter and members were asked to vote on several alternatives. The letter also stressed the importance of voting, "so that the option selected...by the Department truly represents the choice of a majority of its members."

The day before the letters and ballots were to be mailed, Assistant Chief Terrence Gainer gave copies of the documents to FOP Chairman Frank Tracy for review. By letter the next day, FOP objected to the proposed vote and requested that the documents not be sent. MPD denied FOP's request and the letters and ballots were sent as scheduled to police officers.

Subsequently, FOP Chairman Tracy wrote to Chief Ramsey concerning this incident. Tracy accused MPD of committing an unfair labor practice by directly "surveying the membership" concerning a "term and condition" of employment. Tracy also requested that the: (1) ballots be rescinded; and (2) parties engage in impact and effect bargaining. Ramsey denied committing an unfair labor practice and did not rescind the ballots or engage in impact and effect bargaining.

As a result of MPD's actions, FOP filed the present Complaint[3].

II. The Hearing Examiner's Report and Recommendations and FOP and MPD Exceptions:

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[2] D.C. Code § 1-618.8 and Article 4 §2 of the parties' CBA give management the exclusive right to determine the tour of duty.

[3]The Complaint does *not* allege that the changes were implemented. In addition, the parties disagree on whether MPD implemented any changes. (Tr. at p. 9)

The Hearing Examiner acknowledged that a labor organization which is certified as the exclusive representative has "the right to act for and negotiate agreements" for its members pursuant to D.C. Code § 1-618.11(a). (R &R at 5) However, she noted that this right does not automatically prohibit employers from communicating directly with employees, even on matters pertaining to the terms and conditions of employment. (R & R at 5)[4] As a result, she examined whether MPD's conduct was illegal.

Relying on the National Treasury Employees Union v. F.L.R.A.[5] case, the Hearing Examiner determined that it is permissible for an employer to use a questionnaire to survey employees directly in order to gather information or seek opinions. In the National Treasury case, the court found that the use of a questionnaire by the IRS, was a "proper information gathering mechanism" and not an attempt to negotiate directly with employees regarding terms and conditions of employment. 826 F. 2d 114 (D.C. Cir. 1987). In reaching that conclusion, the court balanced the right of employees to exclusive representation with the "advancement of governmental effectiveness and efficiency." Id. The court concluded that the latter should not be "subordinated" to the former. Id.

In the present case, MPD argues that its actions were authorized by D.C. Code §1-618.8[6] and Articles 4 and 24[7] of the parties' CBA. Further, MPD characterizes its actions as "communicating with membership in order to get their input." Moreover, MPD deemed its action as "a purely discretionary management right." (R &R at 5; Tr. at 7). In addition, MPD claims that it was polling officers concerning these issues in an effort to maintain the efficient and effective service of the agency. Specifically, MPD's goal in making the schedule changes was to have more officers on the street when they are needed the most.

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[4]The CMPA does not contain a per se rule against sending questionnaires or polling union members.

[5]In *National Treasury Employees Union v. F.L.R.A.*, 826 F. 2d 114 (D.C. Cir. 1987), the United States Court of Appeals for the District of Columbia found that the IRS' action of surveying employees on a number of issues (including the use of computers, time needed for training, career interests, and skills), did *not* constitute improper polling regarding terms and conditions of employment.

[6] D.C. Code §1.618.8 entitled "Management Rights" gives management the sole right to establish an employee's tour of duty, *inter alia.*

[7] As stated earlier, Article 4 §2, "Management's Rights," among other things, gives the Agency the right to determine the tour of duty.

Article 24 §1 gives management the right to assign days off and tours of duty that are either fixed or rotated on a known regular schedule.

Based on her reading of the National Treasury case, the Hearing Examiner found that MPD's action in distributing the letter and ballots was merely information gathering. As a result, she determined that MPD's actions did not constitute an unfair labor practice. (R &R at 6)

In its Exceptions, FOP disagrees with the Hearing Examiner's findings. FOP asserts that the Hearing Examiner's findings clearly misstate the current legal standard regarding an employer's ability to poll employees who are represented by a labor union. Specifically, FOP contends that employers cannot directly poll employees represented by a labor organization *when the poll amounts to an attempt by the employer to circumvent the union and negotiate with the union [membership].*

FOP primarily bases its assertions on its reading of two Federal Labor Relations Authority decisions which found that the employer improperly polled its employees.[8] In HHS v. AFGE Local 3512, the FLRA found that the agency bypassed the union and committed an unfair labor practice when it polled employees on a change in work shift. 28 FLRA 409, 430 (1987). [9] In DOT v. Professional Airways, the FLRA found that the agency committed an unfair labor practice when it bypassed the union and polled employees regarding the elimination of the weekend evening shift .[10] 19 FLRA 893, 895 (1985) In reaching its decision, the FLRA found that DOT's actions went

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[8]Dept. of Health and Human Serv., Social Security Admin., Baltimore, Maryland and American Federation of Gov't Employees, Local 3412, 28 FLRA 409, 430 (1987) and Dept. of Transportation, Federal Aviation Admin. and Professional Airways Systems Specialists, 19 FLRA 893, 895 (1985).

[9]The specific facts of HHS v.AFGE Local 3512 are that prior to the poll being distributed and without seeking the union's agreement, the Agency notified the union that it was going to poll employees before agreeing to negotiate over shift changes. The Agency subsequently decided not to negotiate based on the results of the poll. 28 F.L.R.A. 409, 431-32. The FLRA determined that a change in duty hours for an established shift was negotiable. Id. Therefore, the employer polled its employees on a matter that was "properly bargainable" with the union. Id. at 433. The FLRA rejected the Agency's argument that changing the duty hours was nonnegotiable, and could only be negotiated at the Agency's election. Id. Additionally, it found that the employer intended to use and did use the information gained in the poll in a way that undermined the union's status as the exclusive representative. Id.

[10]The specific facts of DOT v. Professional Airways are that a supervisor, without notifying the union, placed a hand written memo on the employee bulletin board suggesting the possibility of doing away with the weekend evening shift and asked employees how they felt about the change. A space was provided for each employee to initial "for," "against, "or "don't care." Additionally, the supervisor held a mandatory meeting with staff where he requested their opinion on shift changes. The union representative was notified of this meeting, but chose not to attend.

beyond mere information and opinion gathering concerning its operations, and crossed over into the realm of negotiating and dealing directly with unit members concerning conditions of employment. Id. In the Authority's view, the agency's conduct constituted an unlawful bypass of the exclusive representative. The Authority made this determination based on its conclusion that (1) the polled issues concerned immediately contemplated changes in conditions of employment affecting unit employees, and (2) the polling was an attempt by management to negotiate or deal directly with unit members concerning such matters. Id.

FOP asserts that the facts in HHS v. AFGE Local 3512 and DOT v. Professional Airways are analogous to those in the present case. As a result, FOP contends that the Board should find that MPD committed an unfair labor practice by polling officers about tours of duty and days off.

III. Discussion

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 DC R 1449 (2000) Slip Op. No. 607, PERB Case No. 99-U-44 (1999). [11] Where the Board has no set precedent on an issue, it looks to precedent set by other labor relations authorities, such as the National Labor Relations Board and the Federal Labor Relations Authority. Forbes v. IBT, Local 1714, 36 DCR 7107, Slip Op. No. 229, PERB Case No. 88-U-20 (1989). As noted earlier, the Hearing Examiner relied on National Treasury Employees Union v. F.L.R.A., when she determined that MPD's acts did not constitute improper polling. 826 F. 2d 114 (D.C. Cir. 1987).

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.

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

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[11] In these cases, the Board found that communication was proper and direct dealing had not occurred where management communicated to employees on the status of contract negotiations. AFSCME D.C. Council 20 and GDC, et. al., 36 DCR 427, Slip Op. No. 200, PERB Case No. 88-U-32, 236 DCR 427 (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).

Examiner's finding, we believe that MPD made a decision to 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 view of the above, we reject the Hearing Examiner's findings that MPD did not commit an unfair labor practice. Specifically, we find that MPD violated the CMPA by contacting FOP's membership directly to get their opinions on proposed changes to their tour of duty and days off schedule.

III. Remedy

Since we have determined that MPD violated the CMPA, we must now consider what is the proper remedy in this case.

FOP requested that the Board direct MPD to return to the *status quo* prior to balloting. In addition, FOP is asking that the Board order MPD to post a notice acknowledging that it committed an unfair labor and pay attorney fees.

When a violation of the CMPA is found, the Board's order is intended to have a therapeutic, as well as a remedial effect. (See, D.C. Code §§1-605.(3) and 1-618.13 (1)). Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices, is the protection of rights and obligations. As a result, we believe that the appropriate remedy in this case is to direct that MPD: (1) rescind its questionnaire and (2) refrain from using the results of the ballots that were mailed in May 1999. Additionally, we are directing that MPD post a notice indicating that it has committed an unfair labor practice.

With respect to FOP's request for attorney fees, the Board has consistently held that it does not have authority to grant attorney fees; therefore, that request is denied. *See e.g.,* International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital,

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[12] The May 3, 1999 letter from Chief Ramsey to the officers states that the changes would be made the next month (June).

[13] As stated earlier, changes in the tour of duty are a management right. However, MPD still has a duty to bargain over the impact and effect of its change, upon FOP's request.

39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) and University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991).

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner. The Board finds that the Hearing Examiner's conclusions and recommendations are *not* persuasive or supported by the record. Therefore, the Board *rejects* the Hearing Examiner's findings and conclusions that MPD did *not* violate D.C. Code §1-618.4(a)(1) and (5). As a result, we find that MPD committed an unfair labor practice by dealing directly with bargaining unit members and by refusing to bargain with the FOP concerning proposed changes to the terms and conditions of employment.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department (MPD), its agents and representatives, shall cease and desist from violating D.C. Code § 1-618.4 (a)(1) and (5), by the acts and conduct set forth in this Opinion.

2. MPD, its agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act (CMPA) in any like or related matter.

3. MPD shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice, admitting the above noted violations where notices to employees are normally posted.

4. MPD shall refrain from using the data they obtained from the poll for any purpose.

5. MPD shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly and as to the steps it has taken to comply with paragraphs 3 and 4 of this Order.

6. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

June 1, 2001

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 99-U-27 was transmitted via Fax and/or U.S. Mail to the following parties on this 1st day of June 2001.

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Sheryl V. Harrington

Sheryl Harrington
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT (MPD), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 649, PERB CASE NO. 99-U-27 (June 1, 2001).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code §1-618.4(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 649.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA) to freely: (a) form, join, or assist any labor organization and (b) bargain collectively through representatives of their own choosing.

WE WILL immediately rescind the balloting contained in the May 3, 1999 letter sent to "all sworn" members the rank of captain and below" which notified them that MPD intended to "standardize the tour of duty and days off schedule for the seven police districts."

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Metropolitan Police Department

Date:_____ By_____
Director

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employees Relations Board, whose address is: 717 14th Street, N.W., 11th Floor Washington, D.C. 20005. Phone: (202) 727-1822.

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

June 1, 2001