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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: D.C. Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, Locals 709, 877, 1200, 1808, 2087, 2091, 2092, 2095, 2096, 2401, 2743, 2776, 3758; American Federation of Government Employees, AFL-CIO, Locals 383, 631, 727, 872, 1000, 1975, 2553, 2725, 2737, 2741, 2978, 3406, 3444, 3721, 3871; National Association of Government Employees, AFL-CIO, Local Re-05; International Brotherhood of Police Officers, AFL-CIO, Local 445; Communications Workers of America, AFL-CIO, Local 2336; International Brotherhood of Teamsters, AFL-CIO, Local 1714; Washington Area Metal Trades Council; Service Employees International Union, Local 1199 E-DC; and Laborers International Union, N.A., Local 960, Complainants, v. Government of the District of Columbia, Board of Trustees of the University of the District of Columbia, Board of Trustees of the D.C. Public Library and Agencies under the Personnel Authority of the Mayor, Respondents.	PERB Case No. 92-U-24 Opinion No. 343

DECISION AND ORDER

On October 19, 1992, the Public Employee Relations Board (Board) issued a Decision and Order on Request for Preliminary Relief in an Unfair Labor Practice Complaint (Complaint) charging that the above-referenced Respondent violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (5) and D.C. Code Sec. 1-625.2(d). [1/] Specifically, Complainants alleged that Respondents "unilateral[ly] impos[ed] [] certain furlough dates and [] refus[ed] to bargain on any aspect of such furloughs on the procedures to implement such furloughs" promulgated pursuant to the Omnibus Budget Support Temporary Act of 1992 (OBSTA) and enacted by the Council of the District of Columbia. (Comp. at 1.) The Board denied Complainants' request for preliminary relief pursuant to Board Rule 520.15 and ordered an expedited hearing proceeding before a duly designated hearing examiner in accordance with Board Rule 501.1 "to effectuate the purposes of the CMPA." [2/] See D.C. Council 20, American

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1/ Complainants had sought preliminary relief from the Board to order the Respondents to immediately cease-and-desist from refusing to bargain, rescind planned furlough dates and make affected employees whole for any unilateral action by Respondent.

2/ On November 19, 1992, Respondents filed a Motion to Stay Unfair Labor Practice Proceeding. Complainants filed an Opposition to Motion to Stay on that same date. Respondents requested that the Board stay further proceedings in the Complaint until the D.C. Superior Court rendered its decision in a then pending civil action challenging the legality of the furlough legislation. The Board's Executive Director notified the parties by letter dated November 20, 1992, that the Motion would be referred to the Hearing Examiner for a determination.

At the November 25, 1992 hearing, Respondents' Motion to Stay the proceedings was denied. The Hearing Examiner set forth the basis for his ruling as follows:

> The instant case is concerned solely with whether the District violated the CMPA and committed an unfair labor practice by refusing to bargain with the Unions over the impact and effects of the OBSTA-mandated furloughs and, if so, to determine the appropriate relief for that statutory violation. This case does not directly challenge the validity of the furloughs and proceeded without any intent to prejudice the

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Federation of State, County and Municipal Employees, AFL-CIO, Locals 709, 877, 1200, 1808, 2087, 2091, 2092, 2095, 2096, 2401, 2743, 2776, 3738, et al. v. Government of the District of Columbia, Board of Trustees, University of the District of Columbia, Board of Trustees of the D.C. Public Library and Agencies under the Administrative Control of the Mayor, ____DCR ____, Slip Op. No. 330, PERB Case No. 90-U-24 (1992).

This matter is now before the Board on exceptions from both parties to the Hearing Examiner's Report and Recommendation. The history and issues in this case are set out by the Hearing Examiner in his Report and Recommendation (R&R) a copy of which is attached as Appendix A.

The Report and Recommendation

In his Report and Recommendation, the Hearing Examiner concluded that Respondents violated D.C. Code Sec. 1-618.4 (a)(1) and (5) "by refusing to bargain with the Complainant Unions regarding the impact and effects of the furloughs mandated by the OBSTA." (R&R at 20.) In so concluding, the Hearing Examiner found (1) the impact and effects of the furloughs are terms and conditions of employment subject to negotiations under the CMPA; (2) the Board has jurisdiction to interpret the OBSTA to the extent necessary to determine whether the OBSTA relieved Respondents of their obligation to bargain with respect to the impact and effects of the furloughs; (3) the OBSTA did not remove the impact and effects of the furloughs from the scope of bargaining mandated by the CMPA; (4) Respondent's offer to consult with Complainants over the implementation of the furloughs did not satisfy their obligation to bargain under the CMPA with respect to the impact and effect of the furloughs; and

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[2](...continued)
position of either party in the AFGE and AFSCME litigation in regard to the constitutionality of the OBSTA and/or Public Law 102-382.

The ruling on the ULP is not intended to address any of the Parties' arguments or positions advanced in the AFGE and AFSCME litigation. Those suits present challenges to the validity of the underlying furlough decision itself (as well as other aspects of the OBSTA regarding WIGIs). (R&R at 35.)

We affirm the Hearing Examiner's ruling denying the Motion for the above noted reasons set forth in his Report.

(5) Complainants made a valid demand to Respondents to engage in impact-and-effects bargaining over the furloughs.

The Hearing Examiner rejected the Complainants' claim of a "free standing" violation of D.C. Code Sec. 1-625.2(d). According to the Hearing Examiner, there was no evidence that the furlough procedures provided in the OBSTA met the prerequisite of Section 1-625.2(d) of having been "developed under the authority of th[at] subchapter" of the CMPA. (R&R at 35-36.)

Finally, the Hearing Examiner recommended as the appropriate relief for the violation found, the remedy ordered by the Board in International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, ____DCR____, Slip Op. No. 312, PERB Case No. 91-U-06 (1992) and International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital, ____DCR____, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) which concerned violations of D.C. Code Sec. 1-618.4(a)(1) and (5) in the context of impact and effects bargaining. The recommended remedy, in the main, consists of an expedited bargaining schedule and elective retroactive application of any negotiated agreement and/or terms imposed by interest arbitration concerning the impact and effects of the furlough not preempted by the OBSTA. The Hearing Examiner, however, recommended that implementation of furloughs not be stayed nor should back pay be ordered for furloughs implemented without the benefit of bargaining.

With the exception of two corrections of the record, discussed below, the Board, after reviewing the entire record, finds no merit in the exceptions filed by either party. With respect to all other findings of fact, conclusions of law and recommendations, we find the Hearing Examiner's analysis and reasoning to be thorough, well-reasoned and persuasive. We therefore adopt them to the extent consistent with this decision and order as set forth below.

Respondents' Exceptions [3/]

[3/] Respondent University of the District of Columbia (UDC) and Complainant American Federation of State, County and Municipal Employees, Local 2087, AFL-CIO (AFSCME, Local 2087), the exclusive bargaining representative of a bargaining-unit of UDC employees, expressly agreed on the record that they would attempt to work out a settlement with respect to the Complaint's "UDC-specific" allegations. In the event they were not successful, the parties further agreed to proceed before the Hearing Examiner on December 15, 1992. (Tr. at 9.). An agreement
(continued...)

Respondents first exception objects to the Hearing Examiner's asserted failure to "take into account" the D.C. Court of Appeals' decision upholding the furloughs. [4] (Resp. Excep. at 2.) Respondent contends the decision is "definitive and dispositive" and requests that the Board dismiss the Complaint "in light of the Court of Appeals decision." (Resp. Ex. at 3.) Notwithstanding the fact that the Court of Appeals decision was issued after the Report and Recommendation, the Hearing Examiner's discussion of the ongoing civil action's relationship to the issues in this proceeding was dispositive. (See n. 2.) Moreover, Respondents' contention fails to state how the Court's decision, which addressed issues concerning the legality of the underlying furloughs pursuant to the OBSTA, is "definitive and dispositive" of the issues addressed in an unfair labor practice proceeding. [5] As the Hearing Examiner observed, "this case does

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[3](...continued)
was reached and reduced to a Memorandum of Understanding (MOU) on December 16, 1992 that "addressed a number of impact and implementation issues stemming from UDC furloughs." (R&R at n.1.) AFSCME, Local 2087 did not notify the Hearing Examiner of any intention to go forward with the UDC allegations nor has the Board received any communication from Complainants' representative to this effect. As there is no evidence and, therefore, no basis for making any findings with respect to the UDC allegations contained in the Complaint, we dismiss those allegations. Complainant AFSCME, Local 2087 is granted leave to file exceptions, should they wish, with the Board with respect to this ruling.

[4]/ The D.C. Court of Appeals had stayed an October 22, 1992 order of the D.C. Superior Court granting a preliminary injunction of the furloughs until the matter could be heard on its merits. The Court of Appeals on January 15, 1993, upheld the legality of the furlough legislation, i.e., OBSTA. See, the D.C. Superior Court decision at American Federation of Government Employees, et al. v. District of Columbia, et al., Civil Action No. 92-CA 06954 and American Federation of State, County and Municipal Employees, et al. v. District of Columbia Board of Education, et al., Civil Action No. 92-CA 12225. See also, the decision of D.C. Court of Appeals at District of Columbia, et al., v. American Federation of Government Employees, et al., No. 92-CV-1275 and District of Columbia Board of Education, et al. v. American Federation of State, County and Municipal Employees, et al., No. 92-CV-1276 (January 15, 1993).

[5]/ The D.C. Court of Appeals has ruled that "the power to... [d]ecide whether unfair labor practices have been committed and
(continued...)

not directly challenge the validity of the furloughs." (R&R at 35.) Rather, this case concerns obligations and duties under the CMPA that may attach to the implementation of a term or condition of employment, i.e., furloughs. Finally, as Respondents noted, the Court found the furloughs legally sufficient. Therefore, the Court's decision did not render moot the issues in this proceeding.

Next, Respondents object to the Hearing Examiner's failure to find that Respondents had met its obligation to bargain the impact and effects of the furloughs when it presented the Complainants with a draft Memorandum of Understanding (MOU) concerning the furloughs at a July 7, 1992 meeting. Respondents' exception merely quarrels with the Hearing Examiner's findings based on the evidence presented that the July 7, 1992 meeting was not a negotiation session. Moreover, the MOU was found to be a substantive proposal concerning the furloughs themselves rather than the impact and effects of the furloughs on employees' terms and conditions of employment. Complainants' initial demand to bargain over the impact and effects of the furloughs, the Hearing Examiner found, was not made until the parties' July 22, 1992 negotiation session. (R&R at 6.) Respondents have presented no basis for rejecting these findings by Hearing Examiner when, as here, they are supported by the record. [6/] Such findings of

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[5](...continued)
issue an appropriate order" means that "primary jurisdiction to determine unfair labor practice claims lies with the PERB, subject only to review by the [local] courts under well established principles of administrative law." Hawkins v. Hall, 537 A.2d 571 (D.C. App. 1988)

[6/] The MOU provided for the scheduling of furloughs on holidays and in months with no holidays. It can be reasonably concluded on this record that Complainants July 16, 1992 reply to Respondent's MOU --to "reject [the] proposal, and any other proposed action as it relates to the proposals"-- was directed at the implementation of the furloughs and not their impact and effect, once implemented, on employees' terms and conditions of employment. Therefore Respondents' reference to our characterization, in Opinion No. 330, of the July 7, 1992 meeting and Respondents' proposed MOU as an "attempt[] to bargain with Complainants... concerning the furloughs" is to no avail since we made no determination as to the nature of the bargaining attempt. Moreover, our observation merely noted assertions in Respondents' Answer to the Complaint as possible issues for the Hearing Examiner to develop in the evidentiary hearing. Other references in Respondents' exceptions to observations we made in Opinion No.
(continued...)

fact are for the Hearing Examiner to decide. University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992).

Respondents next two exceptions take issue with its obligation to bargain the impact and implementation of the furloughs when Complainants' (1) "only proposal addressed the substance of the furloughs rather than impact and effect" and (2) sole proposal concerning the furloughs was not negotiable." (Resp. Ex. at 4-5.) Respondents, once again, ignore the Hearing Examiner's findings in this regard. Based on the sole witness to testify about the July 22, 1992 meeting --where the Hearing Examiner determined Complainants' initial demand to bargain over the furloughs' impact and effects was made-- the Examiner also found that "some of the areas as to which the Unions might wish to bargain were raised ... orally at those bargaining sessions." (R&R at 31.) The Examiner further concluded that the Complainants renewed their demand to bargain the impact and effects of the furloughs, orally, at an August 19, and September 2, 1992 bargaining session and in writing on September 4, 1992, to no avail. (R&R at 27 and 31.) Based on these findings, the Hearing Examiner concluded that Respondents' "repeated stated refusals to engage in any impact and effects bargaining" confronted Complainants with a "wholesale rejection of any obligation to bargain". (R&R at 31.)

We have ruled that where there exists "a duty to bargain over the impact and effects of...decisions involving the exercise of managerial prerogative,...categorically refus[ing] to bargain over those aspects..., prior to implementation" is done so at the "risk" of the party having the duty. (emphasis added) Teamsters Local 639 and 730 a/w IBTCWHA v. D.C. Public Schools, 35 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990). See also, International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital, ___ DCR ___, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). Respondents' violative conduct preempted any bargaining, which precludes the presumption advanced by Respondents that they could not have met their statutory obligation to bargain had the Complainants been afforded such an opportunity.

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[6](...continued)
330 as support for its position is similarly to no avail. Our observations merely highlighted pertinent issues that could not be resolved on the pleadings but rather required findings of fact based on the evidence presented.

The fifth exception by Respondents contends that the Hearing Examiner's reliance on certain Board decisions is misplaced. Respondent first objects to the "Examiner's reliance on two similar Board decisions, i.e., International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, ____DCR____, Slip Op. No. 312, PERB Case No. 91-U-06 and ____DCR____, Slip Op. No.322, PERB Case No. 91-U-14 (1992). Neither case, argues Respondents, involved specific proposals advanced by the Union or a statutory mandate to act, i.e., OBSTA, required of the Respondent.

Respondents' exception, however, misses the point. As discussed in the previous two exceptions, Respondents had confronted Complainants with a "wholesale" rejection of the Complainants' request on several occasions. [7] Similar acts and conduct served as the basis for finding a violation of D.C. Code Sec. 1-618.4(a)(1) and (5) in the cited Board decisions, notwithstanding the existence of specific proposals. Moreover, good faith collective bargaining necessarily entails a full and unabridged opportunity to advance, exchange, give and take, as well as reject specific proposals.

With respect to the second contention, we draw little distinction when determining whether an employer has met its obligations to bargain the impact and effects of affected employees' terms and conditions of employment regardless of whether it results from the exercise of a management prerogative provided under the CMPA, as was the case in the cited Board cases, or, as in this case, provided by other statutory authorization, e.g., OBSTA. We find no error by the Examiner's use or reliance upon these Board decisions under the facts of this case. [8]

7/ Respondent also cites a U.S. Court of Appeals for the District of Columbia case, setting aside a Federal Labor Relations Authority (FLRA) decision, finding no refusal to bargain over a union's sole proposal concerning when to implement a management program. Notwithstanding the fact that this case was decided under the Federal Service Labor Management Relations Act, which provides significant differences concerning management's rights to implement, as we discussed in Respondents' previous two exceptions, the findings of fact supporting a violation of Respondents' duty to bargain under the CMPA are significantly different from the facts of the FLRA case.

8/ Respondent also attempted to draw analogies between the facts of this case and another Board and FLRA negotiability

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Respondent next excepts to the underlined portion of the following conclusion made by the Hearing Examiner in his Report and Recommendation:

> As previously noted, the District agreed at the November 25, 1992 hearing that it was not arguing that there had been any waiver of the legal obligation to bargain or that the obligation to bargain had, in fact, been satisfied by the Parties' conduct. That stipulation by the District, also is borne out by the record evidence in this case. (R&R at 30-31.)

A review of the record reveals that the Hearing Examiner apparently, and inadvertently, misrepresented a stipulation made at hearing and set forth earlier in his Report where the parties actually stipulated to the following:

> But it's my understanding that both parties are treating this case as one involving solely the question of the obligation to bargain over the impact and implementation of the furlough decisions, along with related remedy questions. And they do not include the question -- let me backtrack. There is no claim being asserted by the District affirmatively either that bargaining has already taken place as a matter of fact or that there was a waiver in any way of the obligation to bargain if one existed under the law. (R&R at 18 quoting Tr. at 17-18.)

We therefore set aside the Hearing Examiner's finding at pages 30 - 31 of his Report and Recommendation to the extent inconsistent with the above-cited stipulation.

Respondent's seventh exception takes issue with what it claims is the Hearing Examiner's "suggesti[on] that 'valid' proposals concerning implementation and impact could properly

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[8](...continued)
appeal cases. We reject rulings in actions specifically limited to determining the negotiability of a subject matter as determinative in unfair labor practice cases that decide whether or not a duty to bargain has been breached. See Teamsters, Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 36 DCR 6698, Slip Op. No. 267 at n.9, PERB Case No. 90-U-05 (1991).

belong in compensation negotiations." (Resp. Ex. at 12-13.) Respondents contend that any such suggestion is at odds with our ruling in Opinion No. 330 in this case where we stated: "[s]ince the [OBSTA] expressly addresses the issue of compensation, collective bargaining is preempted with respect to compensation issues" Id., Slip Op. No. 330 at n. 2. Respondents assert that our ruling limits bargaining over the furloughs to noncompensation matters. Complainant counters that "issues of the impact and implementation of FY 93 furloughs which do not conflict with the furlough legislation [, i.e., OBSTA,] and over which discretion remains are bargainable even if they involve in some way 'compensation'." (Comp. Opp. at 9.)

The facts and issues in this case do not warrant a ruling with respect to whether or not there may exist valid impact-and-effects proposals that concern compensation and that may properly be negotiated in compensation negotiations. Suffice it to say that our ruling in Opinion No. 330, read in context, preempted collective bargaining concerning "any form of compensation" to the extent it conflicts with the OBSTA's mandate of placing furloughed employees "in a non-pay and non-duty status." Title II, Sec. 202(f) of the OBSTA. The lack of findings on this record with respect to specific impact-and-effect proposals concerning compensation renders inappropriate a ruling as to whether or not the OBSTA or its amendment leaves room for such proposals. Any challenge Respondents may wish to make to the validity of any particular impact-and-effects proposals under their duty to bargain, as determined in this proceeding, remains intact through an appropriate action before the Board for resolving such challenges, i.e., negotiability appeals.

Respondents' final exception makes three objections to the Hearing Examiner's recommended remedy as set forth in his Report and Recommendation. First, Respondents assert that our Opinion No. 330 requires that the instant remedy "indicate that only noncompensation bargaining is involved." (Resp. Ex. at 14.) In view of our disposition of Exception 7 above, we find no merit to this contention.

Respondents next object to the recommendation of an expedited bargaining schedule to be conducted on a "daily basis" beginning "7 days after receipt of revised demands to bargain from the Unions". (R&R at 37.) Respondent contends that such a bargaining schedule is not appropriate in a multi-agency situation and "would require the parties to adjust their schedules and revise their priorities". We find no merit to this contention. On the contrary, we view the intended objective of providing this remedial relief is to revise the priorities of Respondents to deter the recurrence of similar unfair labor practice violations. The parties are always free to agree to a

mutually acceptable alternative schedule.

Respondents' last objection is somewhat unclear but it appears that Respondents understand that the recommended remedy provides for retroactive backpay for furloughs that have already occurred upon the completion of bargaining. Paragraph 7 of the recommended remedy provides that "[n]o back pay shall be ordered nor shall the District be directed to cease and desist from implementing already scheduled furloughs pending the completion of the bargaining process[.]" We view this provision of the recommended remedy as merely reflecting our view in Opinion No. 330 that mandated provisions of the OBSTA, which include (1) "plac[ing] an employee temporarily and involuntarily in a non-pay and non-duty status" and (2) furloughs at a rate of one day a month in FY 93 with a minimum of 15 days notice to affected employees, not be frustrated while bargaining takes place. These noted provisions are examples of terms mandated by the OBSTA and therefore are not themselves subject to a duty to bargain and, consequently, the retroactive effect of such bargaining.

Complainants' Exceptions

We regard the Complainants' first two exceptions as not exceptions at all but rather an attempt to (1) supplement the record with information that post-dated the Report and Recommendation concerning the underlying civil action and (2) object, not to any error, but to the extent the Examiner quotes or reiterates rationale from our Opinion No. 330 in this case. Since neither of these points present cognizable exceptions to any of the findings and conclusions in support of the alleged violations before the Hearing Examiner, and now the Board, we dismiss them as lacking any proper issue for the Board to consider. [9/]

Complainant's third exception objects to the Hearing Examiner's finding that "Section 202(a) [of the OBSTA] imposes upon the District the obligation to furlough non-exempted employees, on an agency by agency basis, twelve (12) days during FY 1993, at the rate of one day per month... ." (R&R at 26.) Complainants contend that, to the extent the Examiner's finding reflects a conclusion of law that there be one furlough day during each month in FY 93, it is clearly erroneous. At the time this finding was made, however, it accurately reflected our understanding set forth in Opinion No. 330 of the furlough rate

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[9/] We note, however, the Hearing Examiner's typographical error in the last paragraph of p.2 of his Report. As Complainant suggest, the correct citation is D.C. Law 9-134" rather than "D.C. Law 91-34."

as mandated by the OBSTA. Since the issuance of the Hearing Examiner's Report, however, the Council of the District of Columbia amended Section 202(a) of the OBSTA, as Complainants note, to specifically allow agencies to "use another rate to achieve mandated furloughs days for full-time employees." [10/] Our ruling in Opinion No. 330 that "any relief, preliminary or otherwise, cannot conflict with the mandates of the Act" fully accommodates this amendment or any future amendment that becomes part of the Act, i.e., OBSTA. We address the impact of this amendment more fully in our discussion of Complainants' final exception.

Exceptions 4 through 7 and 9 set forth objections to findings by the Hearing Examiner which, in the main, center around his conclusions that compensation bargaining was preempted in any collective bargaining required by Respondents pursuant to impact and effect of implementing furloughs under the OBSTA. We believe our discussion of Respondents' Exception is dispositive of these exceptions and therefore refer to our discussion there.

Complainants' eighth exception takes issue with the Hearing Examiner's Report to the extent it implies that "negotiations over 'compensation' issues should occur on an agency by agency basis... ." By law, according to Complainants, such issues are addressed on a compensation unit-wide basis unless otherwise agreed. As we previously stated, the issue raised by this exception addresses an issue which exceeds the reach of the allegations of this Complaint, and is therefore irrelevant to the scope of this unfair labor practice proceeding. Insofar as there is any legitimate concern raised by this exception, we believe, once again, that it is adequately addressed in our discussion of Respondents' Exception 7.

The final exception by Complainants asserts that certain aspects of the recommended remedy is "clearly erroneous" since it does not provide a "status quo ante remedy that (1) would provide back pay to employees for furlough days already taken; and (2) would enjoin the District from implementing any additional furlough days until bargaining is complete." (Comp. Ex. at 13.) With respect to the first point, we, once again, reaffirm our observation that "any relief, preliminary or otherwise, cannot conflict with the mandates of the Act." Notwithstanding the District Council's recent amendment to the OBSTA, Complainants' first point remains in conflict with OBSTA's mandate of placing furloughed employees "in a non-pay and non-duty status."

[10/] The amendment is entitled the "Furlough Schedule Clarification Emergency Amendment Act of 1993" which was approved by the Council on January 26, 1993.

Providing back pay to compensate employees for days on which they are furloughed pursuant to law does not restore the status quo.

Complainants' second point rests essentially on the District Council's amendment to Section 202(a) of the OBSTA. Section 202(a) and the amendment thereto provides as follows:

> Sec. 202. Furloughs during Fiscal Year 1993.
> (a) Notwithstanding any other provision of law or regulation, and except as provided in subsections (b) and (c) of this section, each agency shall furlough each employee of the respective agency 12 days during the fiscal year ending September 30, 1993, at the rate of 1 day each month or other rate to achieve 12 days over the work year for employees whose work year is less than 12 months.

Amendment

> or where the agency determines that another rate is necessary to minimize the impact of the furlough on agency services: Provided that, the public schools shall not implement a furlough plan that reduces the number of instructional days.

Complainants contend that since the amendment to the OBSTA "permits furloughs on a different schedule than one day each calendar month, no violation of the OBSTA would occur if future furloughs are enjoined until the bargaining process is completed." (Comp. Ex. at 15.) Respondents counter that the amendment "which permits an agency such as an educational agency to employ another rate when the agency determines that rate is necessary to minimize the impact of the furlough on agency services does not, retroactively or otherwise, make negotiable what the Unions seek to negotiate." (Resp. Opp. at 15.) We believe that both the Complainants' and the Respondents' interpretation of the effect of the OBSTA amendment oversimplify the effect of the amendment on the parties' rights and obligations under the CMPA.

First, we reiterate that prior to the amendment the law under the OBSTA mandated 12 furloughs days in FY 93, at a rate of one a month, unless the workyear for affected employees was less than 12 months. Only if the employees' workyear was less than 12 months was another rate authorized under the pre-amended OBSTA. Clearly, if a more flexible or relaxed interpretation could be attributed to the OBSTA, the District Council would not have deemed it necessary to enact the amendment.

The effect of the amendment extends to all agencies,

regardless of their workyear, the authorization to make a determination that a rate other than one furlough a month "is necessary to minimize the impact of the furlough on agency services[.]" The amendment, however, as evinced by its title, Furlough Schedule Clarification Emergency Amendment Act of 1993 (emphasis added), was enacted to allow agencies to address an emergency situation in the event the agency determines that another rate, other than the statutorily established rate of one furlough a month, would "minimize the impact of the furlough an agency services." Therefore, notwithstanding the fact that the amendment leaves discretion in management to determine another furloughing rate for employees --where a duty to bargain would ordinarily attach-- the amendment places that discretion squarely within a management right under the CMPA, D.C. Code Sec. 1-618.8(a)(6). Section 1-618.8(a)(6) provides respective personnel authorities (management) with the "sole right, in accordance with applicable laws and rules and regulations, ... [t]o take whatever action may be necessary to carry out the mission of the District government in emergency situations." (Emphasis added.)

Thus, agencies, which determine that such an emergency exists, possess the sole right pursuant to the amendment and D.C. Code Sec. 1-618.8(a)(6), respectively, to determine that another furlough rate is necessary to carry out its mission and what that rate will be. Whether a personnel authority conforms with the statutorily established rate of one furlough a month, regardless of the circumstances, or establishes another rate pursuant to a determination that a statutory emergency exists, the CMPA does not impose a duty to negotiate this determination or the rate itself. [11/] Therefore, given the specific objectives of the OBSTA and the amendment, we find it inappropriate under the circumstances of this case to order Respondents to cease and desist further implementation of the furloughs, pursuant to the OBSTA and its amendment, until bargaining is completed. [12/]

[11/] We note that the amendment has a limited duration of 90 days from the date it takes effect. We further note that in the event an agency determines that another rate is not necessary to minimize the impact of the furloughs on agency services, i.e., that a statutory emergency does not exist, the OBSTA and instant amendment does not authorize discretion for agencies to elect a rate other than one furlough a month.

[12/] Respondent agencies that employ individuals whose workyear is less than 12 months and, as a result, are statutorily authorized pursuant to the OBSTA to establish a rate other than one furlough a month to achieve 12 furlough days for those employees in FY 93 workyear, must negotiate that rate unless

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With the forgoing exceptions, clarifications, and additions, we adopt the Hearing Examiner's Report and Recommendation to the extent it is consistent with our Decision and Order. We further adopt his findings that Respondents refused to bargain in good faith with Complainants concerning the impact and effects of implementing furloughs pursuant to the OBSTA and that, by these acts and conduct, Respondent violated the CMPA, D.C. Code Sec. 1-618.4(a)(1) and (5). See, Teamsters Local 639 and 730 a/w IBTCWHA v. D.C. Public Schools, 35 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990) and International Brotherhood of Police Officers, Local 446, AFL-CIO, ____DCR____, Slip Op. No. 312, PERB Case No. 91-U-06 (1992). Finally, we adopt the Hearing Examiner's finding that, by these same acts and conduct, Respondents did not also violate D. C. Code Sec. 1-625.2(d).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint allegations with respect to the Respondent, the Board of Trustees of the University of the District of Columbia, are dismissed.

2. The alleged violation of D.C. Code Sec. 1-625.2(d) by Respondents is dismissed.

3. The Respondents shall cease and desist from unilaterally implementing future furloughs (other than furloughs implemented pursuant to the Omnibus Budget Support Temporary Act (OBSTA)) without first providing notice and an opportunity, upon Complainants' request, to bargain the impact and effect of implementing the furloughs upon the terms and conditions of employment of affected employees in the Complainants' respective bargaining-units.

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[12](...continued)
those agencies determine that the specific rate established "is necessary to minimize the impact of the furlough on agency services pursuant to the amendment." In any event, a duty to bargain exists with respect to the impact and effect of any rate established, as well as other matters not mandated by the OBSTA and amendment on employees' terms and conditions of employment. Finally, Complainants made several exceptions to the recommended remedy based on arguments and contentions made in earlier exceptions to various aspects of the Hearing Examiner's findings and conclusions. Issues raised by these exceptions are adequately addressed in our discussion of these earlier exceptions and require no separate or further consideration.

4. Respondents shall cease and desist from interfering, in any like or related matter, with the rights guaranteed employees by the Comprehensive Merit Personnel Act, by unilaterally implementing furloughs without first providing notice and an opportunity, upon request, to bargain with Complainants, the exclusive representatives of affected bargaining-unit employees.

5. Respondents shall negotiate in good faith with Complainants, upon request, about the impact and effect of the implemented and the future implementation of furloughs on bargaining-unit employees' terms and conditions of employment pursuant to the OBSTA and its amendment, i.e., the Furlough Schedule Clarification Emergency Amendment Act of 1993 (FSCEAA).

6. Respondents shall henceforth cease and desist from implementing furloughs, pursuant to future laws, rules and regulations, before fulfilling its obligation to bargain with Complainants, upon request, the impact and effects of implementing the furloughs on bargaining-unit employees' terms and conditions of employment.

7. Representatives of Respondents and Complainants shall meet within seven (7) calendar days of the date of Complainants' request(s) for bargaining as provided under paragraph 3 of this Order. The representatives shall meet on a daily basis (unless otherwise agreed-upon) until agreement is reached or their efforts result in impasse. Any provision of the resulting agreement between the parties or ultimate award imposed by interest arbitration concerning the impact and effects of furloughs described under paragraph 3 that do not conflict with the mandates of the OBSTA and FSCEAA shall, at the election of Complainants, take effect retroactively to October 23, 1992, the date the first furlough was implemented. If, after 30 days of bargaining, total agreement is not reached, either party may make a request for impasse resolution concerning noncompensation impact-and-effect matters, or upon its own motion, the Board may declare an impasse pursuant to Board Rule 527.1.

8. The Board shall be notified of the date(s) of commencement of all bargaining pursuant to this Order. Thirty days after the date bargaining commences, the respective parties to the bargaining shall provide a summary report on the negotiations with respect to whether or not settlement has been reached and, if not, the likelihood of imminent settlement.

9. Respondents shall, within ten (10) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.

10. Respondents shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

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

March 1, 1993

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES REPRESENTED BY AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO LOCALS 709, 877, 1200, 1808, 2087, 2091, 2092, 2095, 2096, 2401, 2743, 2776, 3758; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCALS 383, 631, 727, 872, 1000, 1975, 2553, 2725, 2737, 2741, 2978, 3406, 3444, 3721, 3871; NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL RE-05; INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, AFL-CIO, LOCAL 445; COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 2336; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, LOCAL 1714; WASHINGTON AREA METAL TRADES COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1199 E-DC; AND LABORERS INTERNATIONAL UNION, N.A., LOCAL 960, AT RESPONDENTS, AGENCIES UNDER THE PERSONNEL AUTHORITY OF THE MAYOR OF THE DISTRICT OF COLUMBIA AND THE D.C. PUBLIC LIBRARY: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 343, PERB CASE NO. 92-U-24.

WE HEREBY NOTIFY our employees that the 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 implementing furloughs pursuant to future laws, rules and regulations without providing an opportunity to bargain to the exclusive representatives of affected employees concerning the impact and effects thereof on bargaining-unit employees' terms and conditions of employment.

WE WILL bargain collectively in good faith with the exclusive representatives of affected bargaining-unit employees over the impact and effects resulting from the implementation of furloughs pursuant to the Omnibus Budget Support Act of 1992 and Furlough Schedule Clarification Emergency Amendment Act of 1993.

WE WILL NOT in any like or related manner interfere with the rights guaranteed to employees by the Comprehensive Merit Personnel Act to bargaining unit employees employed by the above-captioned Respondents.

- over -

Respondents

Date:_____ By:_____
On behalf of Agencies
Under the Personnel
Authority of the Mayor

By:_____
D.C. Public Library

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 the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W., Room 309, Washington, D.C. 20004. Phone: 727-1822