Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 383,	
Complainant,	PERB Case No. 13-U-06
v.	Opinion No. 1449
District of Columbia Department of Youth Rehabilitation Services,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 383 ("Union," "AFGE," or "Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondent District of Columbia Department of Youth Rehabilitation Services ("Agency," "DYRS," or "Respondent") for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act ("CMPA"). Specifically, AFGE alleges that the Agency engaged in direct dealing, and implemented an employee conduct policy ("Policy") without first engaging in substantive and impact and effects bargaining. (Complaint at 7-8). Respondent filed an Answer and Affirmative Defenses ("Answer") in which it denies the alleged violations and raises the following affirmative defenses:

(1) The Office of Labor Relations and Collective Bargaining ("OLRCB") has negotiating authority for all subordinate agencies under the Mayor of the District of Columbia, pursuant to Mayor's Order 2001-168;
(2) The Board has held an employer does not violate D.C. Code § 1-617.04(a)(1) and (5) by unilaterally implementing a management right under D.C. Code § 1-617.08 if there is no request to bargain concerning the impact and effects of the exercise of the management right;

(3) The Complainant failed to bargain in good faith, in violation of the CMPA, when it unilaterally adjourned bargaining; and
(4) Article 31 of the parties' collective bargaining agreement ("CBA") confers upon DYRS the right to direct employees of the agency, and:

> The sole right, authority and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the District in all aspects, including but not limited to, all rights and authority held by the Employer prior to the signing of this Agreement.

(Answer at 15).

II. Facts

On September 5, 2012, DYRS sent an e-mail to its employees announcing the implementation of an employee conduct policy. (Complaint at 2; Answer at 2). The policy's effective date was September 4, 2012, although DYRS states that the policy did not take effect until after the announcement to employees on September 5, 2012. (Answer at 3). The policy was not sent to the Union's president, but was distributed electronically to members of the bargaining unit at DYRS. (Complaint at 2; Answer at 3). DYRS notes that some of the DYRS bargaining unit members serve as Union officials. (Answer at 3). The policy states that it "expands or supplements certain provisions of the District Personnel Manual" ("DPM"), that it applies to all DYRS employees, and that all DYRS staff are responsible for complying with all provisions of the DPM. (Complaint at 2; Answer at 3).

In their pleadings, the Complainant and Respondent describe various functions of the employee conduct policy. The Complainant states that the policy:

> Sets forth a dress code; prohibits staff from developing romantic, sexual or intimate relationships with certain individuals and limits intimate relations between employees and members of other groups; requires employees to self-report to their immediate supervisor or the Director of DYRS if they are arrested or indicted for, or convicted of certain crimes; requires employees to carry facility specific identification cards; prohibits employees from borrowing or lending money from or to each other [other] than "in small amounts"; prohibits any contact with youth served by the Agency or their families outside of the performance of official duties and restricts contact with such youth or their families for years after the youth's contact with the Agency; requires employees to report to DYRS if a relative or close friend comes under the care of DYRS; limits and proscribes use of DYRS computers or telephones and incorporates "Office of the Chief Technology Officer email and internet usage policies"; forbids

> employees from posting "any notice in a DYRS facility without the approval of the management of the facility or office"; prohibits employees from using "harsh, violent, threatening, abusive, or coarse language"; prohibits staff from smoking within 75 feet of the entrance of any DYRS facility or office; forbids employees from bringing "contraband" into a DYRS facility and lists 47 categories of contraband; restricts employees' freedom to write or speak publicly about the Agency without prior Agency approval; and apparently incorporates the "D.C. Government Ethics Manual" which the policy states can be found on the website for the D.C. Office of the Attorney General ("OAG").

(Complaint at 2-3). AFGE asserts that the "Office of the Chief Technology Officer email and internet usage policies" have not been specifically identified or provided to the Union, and that the policies have not been published for notice and comment in the DCMR or been negotiated with the Union. (Complaint at 3). Further, AFGE states that the D.C. Government Ethics Manual is a 40-page document with an additional 114 pages of appendices, has not been published in the DCMR or subjected to notice and comment rulemaking, and has not been negotiated with the Union. *Id.*

In response, DYRS contends that the policy restates existing regulations set forth in the DPM, and that except where expressly provided for in the DPM, the DCMR, or statute, all policies were made pursuant to the Agency's "express management right to direct its employees." (Answer at 5). DYRS disputes the Union's assertion that the Office of the Chief Technology Officer email and internet usage policies were not specifically identified or provided to the Union, stating that the D.C. Code placed the Union on constructive notice of such policies because D.C. Code § 1-602.01 requires the Office of the Chief Technology Officer to issue regulations governing the acquisition, use, and management of information technology and telecommunications systems and resources throughout the District government[1]. (Answer at 6).

AFGE alleges that on the day that the employee conduct policy was announced to bargaining unit members, Union president Timothy Traylor demanded "decisional bargaining over the employee conduct policy." (Complaint at 3). In its Answer, DYRS responds that it is "without knowledge of Complainant's use of the phrase 'decisional bargaining over the employee conduct policy.'" (Answer at 7). DYRS Director Neil Stanley responded "We are happy to meet with you next week. However, we will not be prepared to do anything other than listen if you are unwilling to send us your concerns in advance." (Complaint at 3; Answer at 7). On or about September 13, 2012, OLRCB attorney Nina McIntosh, acting on behalf of DYRS, proposed a meeting to take place on September 25, 2012, for the purpose of impact and effects negotiations over the employee conduct policy. (Complaint at 3-4; Answer at 7). Ms. McIntosh invited Quiyana Hall and Rudy Glenn of DYRS, Dean Aqui from OLRCB, Union president Traylor, and Union attorney Brenda Zwack to the meeting. (Complaint at 4; Answer at 7).

[1] Further, DYRS states that D.C. Code § 1-602.6 makes the regulations applicable to DYRS. (Answer at 6).

The parties met on September 25, 2012. (Complaint at 4; Answer at 8). Present on behalf of the Union were Union president Traylor and Ms. Zwack. (Complaint at 4; Answer at 8). AFGE alleges that the Agency did not show up for the meeting, and that Mr. Aqui and Ms. McIntosh of OLRCB were present. (Complaint at 4). DYRS disputes that DYRS "did not show up for the meeting," and states that its representatives from OLRCB were present. (Answer at 8). AFGE asserts that when it learned that the Agency would not be attending the meeting, it demanded that the meeting be rescheduled for a time when the Agency would be present to engage in impact and effects bargaining. (Complaint at 4). The Agency denies that the Union learned that the Agency would not be coming to the meeting, and asserts that Ms. Zwack informed the DYRS representatives that the Union would file an unfair labor practice complaint if the employee conduct policy was not rescinded by October 2, 2012. (Answer at 8). The Union alleges that it shared a few of its concerns with Mr. Aqui and Ms. McIntosh, but maintained that it did not accept the meeting as impact and effects bargaining because the Agency failed to appear. (Complaint at 4; Answer at 8). DYRS denies that impact and effects bargaining did not occur. (Answer at 8). At the meeting, AFGE stated its position that the Agency could not implement a new dress code or materially change an existing dress code without first engaging in "decisional bargaining" with the Union, and requested a moratorium on the implementation of the employee conduct policy until such time as impact and effects bargaining could take place. (Complaint at 4).

On October 3, 2012, Mr. Aqui e-mailed AFGE, stating that "Management fully intends to honor the law and collective bargaining agreement. Also, the policy will not be rescinded since it is in large part a compilation of existing requirements found in Chapter 18 of the DPM, the District's Ethics Manual, and the Criminal Background Check for the Protection of Children Act." (Complaint at 5; Answer at 9). The Union responded on October 5, 2012, stating that the September 25, 2012, meeting did not constitute impact and effects bargaining, and demanding "impact and effects and decisional bargaining over the policy." (Complaint at 5).

On November 16, 2012, the parties met to bargain over the impact and effects of the employee conduct policy. (Complaint at 5; Answer at 10). Representatives from AFGE and DYRS attended the meeting, as well as Mr. Aqui and Ms. McIntosh. (Complaint at 5; Answer at 10). At the meeting, AFGE raised concerns and asked questions about the employee conduct policy. (Complaint at 5; Answer at 10). Additionally, the Union made proposals to amend or clarify the policy, or to limit its effect to on-duty conduct, and proposed that the Agency provide training on the implementation of the policy. (Complaint at 5; Answer at 10). The Union renewed its position that any change to an existing dress code or implementation of a new dress code would require "decisional bargaining" with the Union. (Complaint at 5; Answer at 10).

During the meeting, there was discussion regarding the participation of the Center for Children's Law and Policy in drafting the employee conduct policy. (Complaint at 6). The parties dispute the extent of the Center's participation. (Complaint at 6; Answer at 11). The parties also dispute whether the Agency consulted with bargaining unit members in creating the policy, with the Agency contending that one of its representatives "stated her honest belief that the Respondent consulted with union members in the drafting of the policy, but also stated that such belief could be erroneous as the policy was drafted prior to her employment at DYRS. The

representative did not specifically state that the Respondent consulted with members of the Complainant in creating the policy." (Complaint at 6; Answer at 11). DYRS stated that it would take the Union's proposals into consideration, but denies AFGE's allegation that DYRS stated it was not the Union's role to effect any changes in the policy, nor would any changes be made. (Complaint at 6; Answer at 12).

AFGE alleges that its representatives left the meeting after learning that there was no one present from DYRS with the authority to reach an agreement with the Union. (Complaint at 7). DYRS disputes the allegation, and states that the Union left the meeting because the Agency "would not make a decision during the meeting that would affect not only union members, but non-union members and members of other bargaining units as well." (Answer at 13).

III. Discussion

AFGE's Complaint raises two categories of allegations: (1) direct dealing; and (2) failure to bargain in good faith. (Complaint at 7-8).

A. Alleged direct dealing

AFGE alleges that DYRS engaged directly with members of the bargaining unit to seek input on the creation of an employee conduct policy, in violation of D.C. Code §§ 1-617.04(a)(1) and (5). (Complaint at 7). AFGE contends that during the November 16, 2012, meeting, DYRS stated that it consulted with members of the bargaining unit in creating the employee conduct policy, and that the Agency did not consult with Union leadership or request the Union to name representative members of the bargaining unit for that purpose. (Complaint at 6).

In response, DYRS admits that one of its representatives "stated her honest belief" that the Agency had consulted with union members when drafting the policy, but that the representative also stated that her belief could be erroneous because the policy was drafted prior to her employment with DYRS. (Answer at 11). DYRS asserts that the representative did not specifically state that the Agency consulted with Union members in creating the policy, and that it was under no obligation to consult with Union officials or representative members of the bargaining unit regarding the Agency's decision to exercise management rights. *Id.*

The Board has held that "mere communication with membership" does not violate the CMPA. *American Federation of State, County, and Municipal Employees, Council 20 v. Barry, et al.*, 36 D.C. Reg. 427, Slip Op. No. 200, PERB Case No. 88-U-32 (1988). In addition, communications that do not attempt to induce employees to take action against their exclusive representative do not constitute direct dealing. *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 48 D.C. Reg. 2931, Slip Op. No. 431, PERB Case No. 95-U-08 (1995). Alleged examples of direct dealing must be examined in context to determine whether the agency intended to disparage or undermine the union's leadership. *AFSCME Council 20*, Slip Op. No. 200 at 4.

In the instant case, the parties dispute whether DYRS consulted with Union members when drafting the employee conduct policy, and indeed disagree over what was said regarding this topic at the November 16, 2012, meeting. (Complaint at 6; Answer at 11). The Board may render a decision on the pleadings only where there is no issue of fact to warrant a hearing. *See American Federation of Government Employees, Local 2978 v. D.C. Dep't of Health*, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 7-8, PERB Case No. 09-U-23 (2013). Here, issues of fact are present concerning whether DYRS consulted with union members when drafting the employee conduct policy, and thus the Complainant's allegation of direct dealing cannot be resolved by the Board on the pleadings. *D.C. Nurses Association v. D.C. Dep't of Youth Rehabilitation Services*, 59 D.C. Reg. 12638, Slip Op. No. 1304 at p. 3; PERB Case No. 10-U-35 (2012). This allegation will continue to be processed through an unfair labor practice hearing.

B. Alleged failure to bargain in good faith

a) Employee speech restrictions

AFGE alleges that DYRS interfered with, restrained, and coerced employees in the exercise of their protected rights under D.C. Code § 1-617.01(b), in violation of D.C. Code § 1-617.04(a)(1), and failed to bargain in good faith in violation of D.C. Code §§ 1-617.04(a)(1) and (5) by "unilaterally implementing a policy restricting employees in their public speech and written communications about the Agency, prohibiting 'harsh,' 'coarse,' or 'threatening' speech, and prohibiting employees from making any posting within the workplace that is not pre-approved by management." (Complaint at 7).

In response, DYRS contends that the policy prohibiting employees from using "profane, harsh, violent, threatening, abusive, or coarse language" is prescribed under DCMR Tit. 6b §§ 1603 and 1619. (Answer at 4). DYRS denies the Union's allegation that the policy "restricts employees' freedom to write or speak publicly about the Agency without prior Agency approval," and states that the policy precludes employees from "accept[ing] an invitation to speak before any group or gathering, public or private, as an official representative of DYRS" unless first approved by the Respondent's Director or designee. *Id.* (emphasis in original). Further, DYRS notes that the policy also precludes employees from "submit[ting] for publication any [writing] that pertains to DYRS, the District of Columbia government, its functions, its officers, or its employees, if the item contains official information not otherwise available to the general public which the staff has access to only by reason of his or her government employment," except under certain circumstances, and that the policy is prescribed under DCMR Tit. 6b §§ 1804.1(f), 1804.3, 1804.4, and 1804.5. (Answer at 5) (emphasis in original). Additionally, DYRS states that the policy prohibits employees from posting notices in a DYRS facility without the approval of the management of the facility or office, and notes that the policy does not violate, and is "wholly compatible with," DCMR Tit. 1 § 1419. (Answer at 4).

Pursuant to D.C. Code § 1-617.08(a)(1), management maintains the sole right to "direct employees of the agencies," "in accordance with applicable laws, rules, and regulations." 6-B DCMR §§ 1603.3(g) and 1619.1 list the "use of abusive or offensive language" while on-duty as a cause for disciplinary action, applicable to DYRS through 6-B DCMR § 1600.1. Thus, the

portion of the employee conduct policy prohibiting language punishable by 6-B DCMR §§ 1603.3(g) and 1619.1 is a management right "in accordance with applicable laws, rules and regulations," and the Agency has not violated the CMPA by refusing to engage in substantive bargaining. *Washington Teachers Union, Local 6 v. D.C. Public Schools*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995) (proposal which conflicts with DCMR is nonnegotiable "in accordance with applicable laws, rules, and regulations" pursuant to D.C. Code § 1-[617.08](a)."); *see also Douglas, et al. v. Dixon, et al*, 39 D.C. Reg. 9621, Slip Op. No. 315 at p. 2, PERB Case No. 92-U-03 (1992). However, the Agency is still obligated to bargain in good faith over the impact and effects of a management rights decision pending a timely request to bargain by the Union. *D.C. Nurses Association v. D.C. Dep't of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012).

Regarding the Union's allegations about restrictions on employee's public speech and writings, 6-B DCMR § 1804.1(f) prohibits District employees from engaging in outside employment or other activity which is not compatible with the full and proper discharge of their duties and responsibilities as a government employees, including "[d]ivulging any official government information to any unauthorized person or in advance of the time prescribed for its authorized issuance, or otherwise making use of or permitting others to make use of information not available to the general public." 6-B DCMR §§ 1804.3 and 1804.4 state that employees may engage in "teaching activities, writing for publication, consultative activities, and speaking engagements" outside of working hours or on annual leave or leave without pay, as long as the information used by the employee in those activities does not "draw on official data or ideas which have not become part of the body of public information, except nonpublic information that has been made available on request for use in such capacity, or unless the agency head gives written authorization for use on the basis that its use is in the public interest." 6-B DCMR § 1804.5 prescribes that if compensation is received for engaging in such activities, "the subject matter shall not be devoted substantially to the responsibilities, programs, or operations" of the employee's agency, the employee's official duties or responsibilities, or to information obtained from the employee's government employment. Per these regulations, the portion of the employee conduct policy requiring employees to gain Agency approval before speaking as an official Agency representative or submitting for publication writings containing official information not otherwise available to the general public which the staff has access to only by reason of his or her government employment is an exercise of the Agency's management rights, and the Agency has not violated the CMPA by refusing to engage in substantive bargaining. *Washington Teachers Union, Local 6*, Slip Op. No. 450 at p. 9. However, the Agency is still obligated to bargain in good faith over the impact and effects of a management rights decision pending a timely request to bargain by the Union. *D.C. Nurses Association*, Slip Op. No. 1259.

Regarding the Union's allegations that the Agency has prohibited employees from posting any information in the workplace that is not pre-approved by the Agency, 1 DCMR § 1419 states:

> Only the following types of notices or information bulletins may be posted on bulletin boards in non-public areas [of District-owned buildings]:

(a) Official business notices of the occupant agency;
(b) Request for donations which comply under § 1401.3;
(c) Notices to D.C. employees by concessionaires and other D.C. employees or groups;
(d) Personal notices of agency employees, such as the sale of an employee's home, request for car pool participants, and other notices of this type; or
(e) Notices by recognized labor organizations.

Although DYRS asserts that the policy does not violate, and is "wholly compatible with,"[2] DCMR Tit. 1 § 1419, requiring Agency approval for all postings in DYRS buildings goes beyond the scope of 1 DCMR § 1419. As such, this portion of the employee conduct policy is not "in accordance with applicable laws, rules and regulations," and is therefore not protected as an exercise of management rights. DYRS committed an unfair labor practice in violation of the CMPA when it unilaterally implemented a policy requiring Agency approval for all postings in DYRS buildings without first engaging in substantive bargaining with the Union. The parties will return to a position of *status quo ante*, until such a time as the parties engage in substantive bargaining over this issue.

b) Dress code

Next, AFGE contends that DYRS violated the CMPA by "unilaterally implementing a dress code policy and/or materially altering an existing dress code policy, in violation of past practice and without bargaining with the Union." (Complaint at 7). DYRS asserts that it has maintained a dress code since at least December 10, 2004, in accordance with the Mayor's Reorganization Plan No. 3 of 1986, and that the dress code policy is prescribed pursuant to DCMR Tit. 4 § 513.1, Tit. 4 § 513.2, and Tit. 6b § 1229.2. (Answer at 3).

4 DCMR § 513.1 permits an agency to "prescribe standards of appearance or dress for personnel which serve a reasonable business purpose; for example, to identify its employees to the public by means of a distinctive uniform, or to maintain a neat and clean appearance." Further, 4 DCMR § 513.2 permits an agency to "prescribe standards of appearance or dress for personnel in order to prevent a danger to the health, welfare, or safety of employees or customers; for example, requiring head or hand coverings in food service jobs, or prohibiting loose items of clothing in jobs where the items become caught in machinery." Additionally, DYRS cites to 6b DCMR § 1229.2 in support of its claim that the dress code regulations are prescribed pursuant to District regulations. (Answer at 3). Notwithstanding, this section of the DCMR addresses annual leave, sick leave, and leave without pay, and does not appear to be applicable to this issue.

D.C. Code § 1-617.08(a)(1) grants DYRS the sole right to direct its employees in accordance with applicable law. 4 DCMR §§ 513.1 and 513.2 clearly permit agencies to

[2] Answer at 4.

maintain a dress code for their employees. However, the detailed provisions in the DYRS dress code policy may extend beyond the language of the DCMR, and thus cannot be imposed without bargaining. This question is best determined by a hearing examiner, and will be processed through an unfair labor practice hearing.

c) Limitations on conduct outside of work

Further, AFGE alleges violations for unilaterally implementing: (1) "an employee conduct policy that is overly broad, ambiguous, not narrowly tailored to meet the Agency's legitimate and necessary objectives"; (2) a policy covering employees' off-duty conduct; and (3) a policy which requires employees to self-report arrest or indictment for certain types of crimes. *Id.* DYRS argues that the portion of the employee conduct policy requiring DYRS staff to self-report their arrest for, indictment on, or conviction of certain felonies and misdemeanors to their immediate supervisor or the Director of DYRS, is prescribed under DCMR Tit. 6b §§ 423.3 and 418.1. *Id.* DYRS admits that pursuant to DCMR Tit. 6b §§ 1800.1 and 1803.1(a)(6), the policy limits DYRS staff's personal or social media contact with youth under DYRS care or their families, outside of the performance of the staff's duties. *Id.* Finally, DYRS states that the policy prohibiting DYRS employees from borrowing or lending money from or to each other, except in small amounts, is prescribed under DCMR Tit. 6b § 1803.4. (Answer at 4). DYRS admits that the policy prohibits certain relationships and activities that adversely influence professional conduct or create the appearance of inappropriate behavior while on duty, and notes that the policy is prescribed under DCMR Tit. 6b §§ 1800.1 and 1800.2. (Answer at 5).

AFGE cites no precedent, and the Board can find none, to support its assertion that because the employee conduct policy is allegedly "overly broad, vague, ambiguous, [and] not narrowly tailored to meet the Agency's legitimate and necessary objectives," the Agency has thereby violated some part of D.C. Code § 1-617.04(a)(1) and (5). (Complaint at 7). Therefore, this allegation is dismissed.

The employee conduct policy states:

> DYRS staff shall self-report directly and without undue delay to their immediate supervisor or Director of DYRS their arrest for, indictment on, or conviction of the following felonies or misdemeanors:
>
> a) Murder, attempted murder, manslaughter, or arson;
> b) Assault, assault with a dangerous weapon, mayhem, malicious disfigurement or threats to do bodily harm;
> c) Burglary;
> d) Robbery;
> e) Kidnapping;
> f) Illegal use or possession of a firearm;
> g) Sexual offenses, including indecent exposure; promoting, procuring, compelling, soliciting, or engaging in prostitution;

> corrupting minors (sexual relations with children); molesting; voyeurism; committing sex acts in public; incest; rape; sexual assault; sexual battery; or sexual abuse; but excluding sodomy between consenting adults;
> h) Child abuse or cruelty to children; or
> i) Unlawful distribution or possession of or possession with intent to distribute a controlled substance.

(Policy at 5). 6b DCMR 423.3 requires District employees to "disclose to [their] supervisor any arrest, conviction of a crime, plea of nolo contendere, probation before judgment or placement of a case upon a stet docket, or if he or she has been found not guilty by reason of insanity, for any sexual offenses or intra-family offenses in the District of Columbia or their equivalent in any other state or territory, or for any of the felony offenses listed in subsection 418.1(c)(1) through (9) of this chapter, or their equivalent in any other state or territory, immediately after any of these actions occur." The felony offenses listed in 6b DCMR 418.1(c)(1) – (9) are the same offenses, word for word, as those listed in the employee conduct policy. Per these regulations, the portion of the employee conduct policy requiring DYRS employees to self-report arrest or indictment for certain types of crimes is an exercise of the Agency's management rights, and the Agency has not violated the CMPA by refusing the engage in substantive bargaining. *See Washington Teachers Union, Local 6*, Slip Op. No. 450 at p. 9. Notwithstanding, the Agency is obligated to bargain in good faith over the impact and effects of a management rights decision pending a timely request to bargain by the Union. *See D.C. Nurses Association*, Slip Op. No. 1259.

The portion of the employee conduct policy limiting personal or social media contact with youth and families under DYRS care states:

> 1. DYRS staff shall not have personal contact or social media contact with youth under DYRS care or their families other than in the performance of their duties as DYRS employees. DYRS staff shall not have personal or social media contact with such youth after the youth have left the agency's care except in the performance of their duties as DYRS employees, or after three years have passed since the youth was under the agency's care.
> 2. DYRS staff shall not give their personal phone numbers, email addresses, or home or mailing addresses to youth under DYRS care, unless three years have passed since the youth was under the agency's care.
> 3. DYRS staff shall not permit youth under DYRS care to use their personal cell phones.

(Policy at 6).

6b DCMR 1800.1 requires District employees to "at all times maintain a high level of ethical conduct in connection with the performance of official duties," and to "refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government." 6b DCMR 1800.2 states that "[t]he maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to assure the proper performance of government business and the maintenance of confidence by citizens in their government," and that "[t]he avoidance of misconduct and conflicts of interest on the part of employees is indispensible to the maintenance of these standards." 6b DCMR 1800.2. 6b DCMR 1803.1(a)(6) instructs employees to "avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of affecting adversely the confidence of the public in the integrity of the government." 6b DCMR 1803.1(a)(6). The prohibition on outside personal or social media contact for a three year period following the time that a youth was under the Agency's care may extend beyond the scope of the DCMR, and thus cannot be imposed without bargaining. This question is best determined by a hearing examiner, and will be processed through an unfair labor practice hearing.

In regard to the portion of the employee conduct policy prohibiting employees from borrowing from or lending money to each other, DYRS cites to 6b DCMR § 1803.4, which states that employees "shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay," but "does not preclude the presentation or acceptance of a voluntary gift of nominal value or of a cash donation in a nominal amount when given on a special, infrequent occasion such as marriage, illness, or retirement." (Answer at 4). Contrary to DYRS's assertion, 6b DCMR § 1803.4 does not prohibit employees from borrowing from or lending money to each other, except in small amounts, and cannot be used to support its claim that this portion of the employee conduct policy is an exercise of management rights "in accordance with applicable laws, rules and regulations." Therefore, DYRS committed an unfair labor practice in violation of the CMPA when it unilaterally implemented a policy prohibiting employees from borrowing from or lending money to each other without first engaging in substantive bargaining with the Union. The parties will return to a position of *status quo ante*, until such a time as the parties engage in substantive bargaining over this issue.

In addition to the above allegations of a failure to bargain in good faith by unilaterally implementing changes to the terms and conditions of employment, AFGE also asserts that DYRS unilaterally implemented an employee conduct policy "concerning, in part, subjects within the ambit of managerial rights," without first engaging in impact and effects bargaining. (Complaint at 8). In its affirmative defenses, DYRS states that AFGE "demanded decisional bargaining over the employee conduct policy," and did not request impact and effect bargaining over the exercise of a management right. (Answer at 15, citing Complaint at 3). Further, DYRS contends that Article 31 of the parties' CBA confers upon the Agency the right "[t]o direct employees of the Department," as well as:

> The sole right, authority and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage

> the affairs of the District in all aspects, including but not limited to, all rights and authority held by the Employer prior to the signing of this Agreement.

(Answer at 15).

As discussed *supra*, many of the provisions in the employee conduct policy implicate management rights, but an exercise of management rights does not relieve an employer of its obligation to bargain over the impact and effects of, and procedures concerning, the implementation of management rights. *See Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994); *see also American Federation of Government Employees, Local 383 v. D.C. Dep't of Disability Services*, 59 D.C. Reg. 10771, Slip Op. No. 1284, PERB Case No. 09-U-56 (2012). Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain. *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). "Any general request to bargain over a matter implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable." *Int'l Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). An unfair labor practice has not been committed until there has been a general request to bargain and a "blanket" refusal to bargain. *American Federation of State, County, and Municipal Employees, District Council 20, Local 2921 v. D.C. Public Schools*, 60 D.C. Reg. 2602, Slip Op. No. 1363 at p. 5, PERB Case No. 10-U-49 (2013) (*citing 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. 9, PERB Case Nos. 00-U-36 and 00-U-40 (2002)).

In the instant case, the parties dispute whether a timely request to bargain was made, and whether impact and effects bargaining occurred at the September 25, 2012, or November 16, 2012, meetings. (Complaint at 4-7; Answer at 8-13, 15). As issues of fact exist concerning whether DYRS violated the CMPA by failing to bargain in good faith with the Union over portions of the employee conduct policy implicating management rights, the matter is best determined after the establishment of a factual record through an unfair labor practice hearing. *See Allen v. Board of Trustees of the University of the District of Columbia*, Slip Op. No. 1416 at p. 3, PERB Case No. 11-U-45 (Sept. 3, 2013).

C. Other affirmative defenses[3]

The first affirmative defense raised by DYRS is that "OLRCB has negotiating authority for all subordinate agencies under the Mayor of the District of Columbia, pursuant to Mayor's Order 2001-168." (Answer at 15). This argument may be raised before the hearing examiner in response to the Union's allegation that DYRS representatives with negotiating authority did not attend the September 25, 2012, or November 16, 2012, meetings. (Complaint at 4-7).

[3] DYRS's second and fourth affirmative defenses are discussed on p. 10, *supra*.

DYRS's third affirmative defense is that AFGE failed to bargain in good faith in violation of the CMPA when it unilaterally adjourned bargaining. (Answer at 15). Although this allegation may form the basis of an unfair labor practice complaint against the Union, it is not an affirmative defense, and is therefore dismissed.

IV. Conclusion

The Board concludes that DYRS engaged in unfair labor practices, in violation of D.C. Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented portions of an employee conduct policy requiring Agency approval for all postings in DYRS buildings and prohibiting employees from borrowing from or lending money to each other without first engaging in substantive bargaining with the Union. The Agency will cease and desist from violating the CMPA in this manner, rescind these portions of the employee conduct only, and engage in bargaining with the Union over these subjects. The Agency will also post a notice of these violations where notices to bargaining unit employees are customarily posted in each DYRS building.

In its Complaint, the Union requests an award of attorneys' fees and costs. (Complaint at 8). D.C. Code § 1-617.13 authorizes the Board "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." This does not, however, include an award of attorneys' fees, and therefore no attorneys' fees will be awarded in this case. *American Federation of Government Employees, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 6, PERB Case No. 09-U-65 (2009). The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*:

> First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed... Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.
>
> Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued... What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000). In the instant case, it has yet to be determined whether the Union prevailed in a "significant part of the case." *Id.* Therefore, the determination on the award of costs will be held in abeyance pending the outcome of the unfair labor practice hearing in the case.

The parties will proceed to an unfair labor practice hearing to determine: (1) whether DYRS engaged in direct dealing by consulting with union members in drafting the employee conduct policy, in violation of the CMPA; and (2) whether DYRS refused to engage in impact and effects bargaining with the Union over the employee conduct policy, pursuant to a timely request to bargain.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Youth Rehabilitation Services, its agents, and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by unilaterally implementing portions of an employee conduct policy requiring Agency approval for all postings in DYRS buildings and prohibiting employees from borrowing from or lending money to each other without first engaging in substantive bargaining with the American Federation of Government Employees, Local 383.

2. The District of Columbia Department of Youth Rehabilitation Services will return to a position of *status quo ante* on the portions of the employee conduct policy requiring Agency approval for all postings in DYRS buildings and prohibiting employees from borrowing from or lending money to each other.

3. The District of Columbia Department of Youth Rehabilitation Services shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.

4. Within fourteen (14) days from the issuance of this Decision and Order, the District of Columbia Department of Youth Rehabilitation Services shall notify the Board, in writing, that the Notice has been posted accordingly.

5. The remaining portions of the Complaint will be referred to a hearing examiner for an unfair labor practice hearing.

6. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

7. 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.

January 24, 2014

PERB Public Employee Relations Board
GOVERNMENT OF THE DISTRICT OF COLUMBIA
DC .gov
1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Direct: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES ("DYRS"), 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. 1449, PERB CASE NO. 13-U-06 (January 24, 2014):

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

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1449.

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").

WE WILL cease and desist from unilaterally implementing portions of an employee conduct policy requiring DYRS approval for all postings in DYRS buildings and prohibiting employees from borrowing from or lending money to each other without first engaging in substantive bargaining with the American Federation of Government Employees, Local 383.

District of Columbia Department of Youth Rehabilitation Services

Date:_____ By:_____

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 Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

January 24, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 13-U-06 was transmitted via File & ServeXpress to the following parties on this the 24th day of January, 2014.

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FILE & SERVEXPRESS

/s/ Erin E. Wilcox

Erin E. Wilcox, Esq.
Attorney-Advisor