GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO,	
Complainant,	PERB Case No. 89-U-02 Opinion No. 245
v.	
District of Columbia Department of Finance and Revenue,	
Respondent.	

DECISION AND ORDER

On January 26, 1989, American Federation of State, County and Municipal Employees, District Council 20, Local 2776 (hereafter, AFSCME) filed an Unfair Labor Practice Complaint in this proceeding alleging that the D.C. Department of Finance and Revenue (hereafter, DFR) had violated D.C. Code Sections 1-618.4(a) (1),(2),(3), and (5) by its conduct with respect to certain promotions that were the subject of a pending grievance. DFR denied the commission of any unfair labor practice by Answer filed on February 16, 1989. By notice issued June 22, 1989, PERB ordered a hearing before a duly designated hearing examiner.

The Hearing Examiner, in a Report and Recommendations issued on November 6, 1989, (a copy of which is attached hereto as Appendix 1), concluded that DFR had violated CMPA Section 1-618.4(a)(5) by promoting a small number of employees who were part of a union group grievance concerning promotions then in arbitration, without knowledge of the Union and in a manner calculated to undermine the Union in the eyes of those whom it represented (Report and Recommendation at pp. 10-11, 15, 17-18, 19). The processing and adjustment of grievances, the Examiner ruled, is a part of collective bargaining; and since, the Examiner found, the Union had relied in good faith on management's prior representation that persons in the position of these grievants would not be promoted prior to the arbitrator's decision, the Union had a right to be notified when that position changed "and given the option to attend, what in effect, was a partial grievance adjustment for a small number (two to six) of the 26 grievants" (id. at p.17, and see further discussion at pp. 18-19). The Examiner found a further violation of Section 1-618.4(a)(5) in DFR's failure to provide the Union a list of

employees whose promotions were imminent, as well as those who had already been promoted, as the Union had repeatedly requested during the processing of the group grievance. The Examiner concluded that DFR had interfered with employee rights in violation of Section 1-618.4(a)(1) by the timing of the promotions of grievants on the eve of a resumed arbitration hearing (id. at pp. 20, 24), by its failure to notify the Union of the promotions (id. at pp. 21, 24), and by withholding information about promotions as described in the preceding sentence of this opinion (ibid.).

The Hearing Examiner rejected additional allegations that DFR had dealt directly with individual represented employees in violation of Section 1-618.4(a)(5) (id. at 14), and interfered unlawfully with the amount of back pay ultimately provided to the grievants and unlawfully coerced employees, both of the latter in further violation of Section 1-618.4(a)(1) (id. at 20, 24). The Examiner made no findings or conclusions on the allegations concerning violations of Section 1-618.4(a)(2) and (3); no exceptions were filed concerning these allegations; we find nothing in the record to support them; and we hereby dismiss them. Nor did the Examiner address the Union's request that DFR be ordered to reimburse it for its expenses in this proceeding.

DFR has filed a series of objections to the Report and Recommendations, none of which is well-taken; they are discussed in footnote 1. We therefore adopt the Examiner's findings and conclusions with the following addition: it is the policy of the Board, in accord with well-settled law under the NLRA, to find that a violation of the employer's statutory duty to bargain normally also constitutes derivatively a violation of the counterpart duty not to interfere with employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing. Thus, in this case, we hold that the acts violative of Section 1-618.4(a)(5) also constituted violations of Section 1-618.4(a)(1). [1]/

---

[1]/ DFR filed a series of exceptions. The first took issue with the Examiner's finding that DFR's award of promotions to a small number of the grievants was an adjustment of a grievance within the meaning of the relevant CMPA provision. The Examiner dealt carefully with this issue, and we approve her reasoning at pp. 17-19 of the Report and Recommendations. That the grievance as such was not mentioned in the management-called meeting at which

(Cont'd)

Our order herein requires DFR to cease and desist from the unfair labor practices found and to post the appropriate notice, a copy of which is attached hereto. Our order of affirmative

---

the two promotions were announced to the two promoted can hardly negate the evidence on which the Examiner relied. The second exception, which refers to certain management testimony, ignores the testimony of two witnesses directly supporting the Examiner's finding on the matter (see Foos testimony at Tr. 64 and Brown testimony at Tr. 76), and thus raises nothing but a credibility issue, which of course was for the Examiner to decide. DFR's third exception challenged the Examiner's rejection of its principal defense -- that the promotions were made in the normal course of business --by pointing to a series of factual matters as to which there was, says DFR, no evidence introduced. This is simply to ignore both the evidence that was introduced and formed the basis for the Examiner's finding, and the fact that it was DFR that had the burden of production as to its defense.

Fourth, DFR objects to the finding that the Union, which had filed the grievance and sought its arbitration, should have been notified of the promotions, but in so complaining DFR does not deal with the Examiner's reasoning and extensive discussion of case and statutory material at Report & Recommendation pp. 14-18. Rather, DFR simply asserts an absence of past practice to provide information about promotions to the Union, which is irrelevant to the issues here, and that the individuals involved "did not solely rely on the Union to pursue the grievance" but also inquired directly of management concerning the status of their promotions, an action that cannot reasonably be seen as constituting a waiver of the statutory right to be represented by their exclusive bargaining representative. An exclusive bargaining representative has the explicit right under D.C. Code Section 1-618.6 "to be present and to offer its view" at any meetings held to adjust a grievance that -- unlike the situation here, where the grievance was filed by the Union -- has been filed by the employee on her or his own behalf.

Fifth, DFR quarrels with the conclusion that the Union needed to know of the promotion of selected grievants in order to continue processing the grievance in an informed and intelligent way, contending that the fact that the grievance continued to settlement negates that conclusion. But the failure of an unfair labor practice to completely derail the protected conduct at which it is aimed is not a defense.

Finally, DFR argued against a PERB order that it reimburse the Union for expenses. We deal with this exception in our discussion of that matter in the text.

relief is limited to an award of expenses, to which we return below, all of the grievants having received promotions and agreed-upon back pay as part of the settlement of the grievance in connection with which the unfair labor practices herein occurred.

With respect to the Union's request for its expenses in bringing this action, DFR objects to any determination by the Board requiring its payment of costs since the Hearing Examiner did not so recommend. Moreover, DFR contends that granting such an award is unjustified because the Union made no showing regarding expenses and the Board has never awarded expenses in an unfair labor practice proceeding.

These contentions do not persuade us that the Board is precluded from awarding reimbursement of expenses to AFSCME. D.C. Code Section 1-618.13(d) expressly authorizes the Board to order "payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." [2]/ That authority is not diminished by the fact that we have previously declined to use it. Nor can the fact that the hearing examiner did not address the question of costs deprive us of the power to award them if they are appropriate in the circumstances presented by this case. As to the lack of a factual showing by the Union, we do not view such a showing as a part of the unfair labor practice case any more than a factual showing of the amount of wages lost is part of a discriminatory discharge unfair labor practice case. In both instances, if the facts are contested, the detailed showing is appropriately handled in a supplemental proceeding.

The criteria for determining whether a successful unfair labor practice complainant should be awarded reasonable expenses have not heretofore been addressed by this Board. We think it necessary, therefore, to set out the general criteria that we believe explicit or implicit in the statute. First, any such

---

[2]/ Because the CMPA thus explicitly gives the Board authority to take the action at issue here -- the award of reasonable costs -- it is unnecessary for us to consider here the scope of our remedial authority under Sections 1-605.2(3) and 1-618.13(a). NLRA cases such as Tiidee Products, Inc. and Int'l Union of Electrical Workers, 194 NLRB 1234, 1236-37, 1238 (1972), enf'd in relevant part sub nom. IUE v. NLRB, 502 F.2d. 349 (CA DC 1974), cert. denied sub nom. Tiidee Products, Inc. v. NLRB, 421 U.S. 991 (1975), where the NLRB awarded the prevailing union its litigation expenses are thus of no assistance in the present proceeding, since the NLRB -- which has no provision like D.C. Code Section 1-618.13(d) -- predicated its award on its general remedial authority.

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 face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. This is not to say that we are imposing any limit on the costs that a party may incur, but only that the amount of cost incurred that will be ordered paid by the other party will be limited to that part that the Board finds to be "reasonable". Last, and this of course is the nub 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. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot now foresee. What we can say here is that among the situations 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 bargaining representative. [3]/

The interest-of-justice test is met in this case. We base this conclusion on the hearing examiner's findings that DFR's going around and behind its employees' chosen representative in making a partial grievance adjustment with individual grievants during the pendency of the arbitration was conduct whose "reasonably foreseeable result" was to create distrust of the Union's ability to represent effectively its members in the group grievance (Report at 10); that DFR continued to promote grievants without the Union's knowledge while the Union relied in good faith on DFR's representation that no promotions would be made prior to the arbitrator's decision (id. at 24); that the timing of DFR's initial grievance resolution immediately preceding the scheduled arbitration hearing on the group grievance gave it

---

[3]/ Cf. the discussion in Chairman Calhoun's Opinion in Naval Air Development Center and AFGE Local 1928, 21 FLRA 131 (1986), wherein the Federal Labor Relations Authority addresses the propriety of an award of attorney's fees by an arbitrator pursuant to the Back Pay Act (5 U.S.C. Section 5596), a statute which, like ours, provides explicit authority for the award in question (there, of attorneys fees; here, of "costs").

greater force (id. at 21); and that DFR failed to provide relevant requested information (id. at 22 and 23).

Given the totality of these circumstances, the conclusion is inescapable that the course of DFR's conduct was calculated to undermine the Union and thus force it to seek redress before this Board. DFR persisted in the above-described actions without any plausible defense for its conduct. DFR's unlawful conduct here did not consist of an isolated action, nor did it affect only a few employees. Rather, the foreseeable effect of its conduct was widespread, involving directly twenty-six grievants and, by its manner and timing, the entire unit. Moreover, the unlawful conduct was engaged in by high-ranking DFR officials who are properly held to an awareness of their responsibilities in labor-management relations and their accountability to the agency they represent. We conclude from the foregoing that the interest-of-justice standard is satisfied.

We shall therefore include in our order a directive to the Complainant to file a statement of costs sought from the Respondent, with supporting materials, and to the Respondent then to file whatever response it deems appropriate. The Board's Executive Director has authority to convene a hearing if a hearing is then necessary, and if the parties are unable to agree as to the sum that Respondent must pay to Complainant, to bring the matter to the Board for decision on the amount of reasonable costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Finance and Revenue shall post conspicuously on all bulletin boards within the Department for a period of sixty (60) days, the attached Notice. Said Notices are to be posted not later than fourteen (14) days from the issuance of this Opinion;

2. DFR and its agents shall cease and desist from refusing to bargain collectively in good faith with AFSCME Local 2776; by making partial grievance adjustments without notice to the Union and providing it the opportunity to be present; by failing to provide the Union with requested relevant information; or in any like or related manner;

3. DFR and its agents shall cease and desist from interfering with AFSCME Local 2776 in the processing of its grievances; its administration of the collective bargaining agreement; and by conduct like or related to that described in paragraph 2;

4. DFR and its agents shall bargain collectively and in good faith with AFSCME Local 2776;

5. DFR shall pay reasonable expenses incurred by AFSCME in the filing and processing of this Complaint.

6. AFSCME Local 2776 shall submit to the Board, within fourteen (14) days from the issuance of this Opinion, a statement of the costs sought from the Respondent together with supporting materials; DFR may then file a response to the statement within fourteen (14) days from service of the statement upon DFR.

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

July 6, 1990

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 727-1822/23

NOTICE

TO ALL EMPLOYEES IN THE DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE GOVERNMENT OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 245 PERB CASE NO. 89-U-02.

WE HEREBY NOTIFY our employees that the Government of 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 interfering with AFSCME, Local 2776 in the processing of its grievances and its administration of the collective bargaining agreement;

WE WILL cease and desist from failing and refusing to bargain collectively in good faith with AFSCME, Local 2776;

WE WILL bargain collectively in good faith with AFSCME Local 2776; and

WE WILL pay reasonable expenses incurred by AFSCME in the filing and processing of this Complaint.

This Notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced or covered by any other materials.

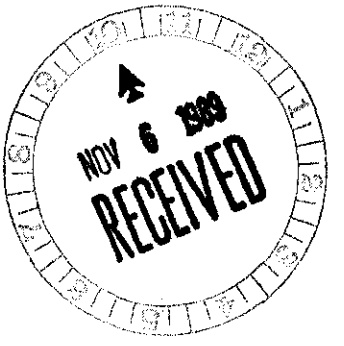
If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is 415-12th Street, N.W., Suite 309, Washington, D.C. 20004.

By: _____
Director, Department of
Finance and Revenue

Date:

OP. 245

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD



IN THE MATTER OF	
LOCAL 2776, COUNCIL 20, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL AFL-CIO	
Petitioners	PERB Case No. 89-U-2
and	
DISTRICT OF COLUMBIA DEPARTMENT OF FINANCE AND REVENUE	
Respondent	

REPORT AND RECOMMENDATION

I. STATEMENT OF THE CASE

The instant case was filed jurisdictionally before the Public Employees Relations Board, pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, (hereinafter referred to as "CMPA" or "the Act".) D.C. Code, Sections 1-601. 1 et seq.

This case involves allegations of unfair labor practice ("ULP") made in the complaint of Local 2776, Council 20, American Federation of State, County and Muncipal Employees, (hereinafter referred to as "the Union"), which alleged the District of Columbia Department of Finance and Revenue, (hereinafter referred to as the "Department" or "Management"), violated Sections 1-618.4(1),(2),(3) and (5) of CMPA **1/** when it improperly, unilaterally and without the knowledge of or agreement by the Union promoted four (4) or more of a group of twenty-six (26) DS-9 revenue officers whose group grievance had been filed by the union. The union's complaint further alleged the promoted employees were told to keep their promotions confidential. Thus, the employer is accused of improper unilateral action and direct

---

1/ Section 1-618.4(a)(1),(2),(3) and (5).

dealing with employees, during the time their career ladder promotions were being pursued in formal grievance proceedings by the union.

Full relief is sought by the union; including promotion of all grievants, issuing an order to cease and desist from unethical practices and reimbursement for expenses. 2/ However, the record shows that all twenty-six (26) grievants have been promoted. Hearing Transcript (HT) at page 35.

II. BACKGROUND

On January 26, 1989, tke District of Columbia Public Employee Relations Board (PERB) received an unfair labor practice complaint filed by the union against the employer.

The chronology of the controversy is as follows:

On February 9, 1987, the union filed a grievance at step three, challenging the Department's failure to promote twenty-six (26) DS-1169-9 Agency Revenue Officers to the next stage of their career ladders i.e. grade D.S. 11. (Union Exhibit No. 8). At an October 27, 1987, hearing on the matter, the employer challenged the arbitrability of the issues presented. Subsequently, the arbitrability hearing was conducted on January 5, 1988, by Joseph M. Sharnoff. Additional days of hearing on the merits were held on December 12 and 19, 1988, and February 8 and 10, 1989, and March 23, 1989.

By memo dated April 1, 1988, the principal Labor Relations Officer advised Department Head Harold Thomas that "ultimate disposition" of the pending arbitration matter regarding the career ladder promotions, was "independent of selection/promotion determinations the department makes pursuant to the Management Rights provision of section 1-618.8 of the D.C. Code (1981 Ed.) and Article II, section of the Collective Bargaining Agreement." (Management Exhibit No. 3).

On June 17, 1988, arbitrator Sharnoff issued his decision; finding the two part career ladder promotion issue

---

2/ Unfair Labor Practice Complaint 89-U-02 filed January 26, 1989 by Local 2776, Council 20 AFSCME, AFL-CIO, with District of Columbia Public Employee Relations Board.

to be arbitrable. He held that once the union met the burden of showing grievant revenue officers met all the criteria for promotion, the burden shifted to the Department to demonstrate a valid justification for its failure to either promote, reassign or take adverse action. (Union Exhibit No. 4). The hearing on the merits of the issues presented continued through March, 1989.

In November 1988, grievant Phyllis Brown accused the union of "holding up" promotions. (HT-40, 71-2). She alleged this accusation was made by manager Stanley Jackson. (HT-71-2). As a result of the controversy generated by Mr. Jackson's alleged accusation, Union Local President, Joyce Gore, met with Mr. Jackson's boss, Mr. Harold Thomas, who stated he would not promote the grievants to the grade 11 revenue officer positions while the matter of their challenged career ladder promotions was in arbitration. (HT-73, 74, 117, 146). Notwithstanding, another instructive memorandum was sent from Labor Relations Officer Harris to Mr. Thomas stating that the promotions were permissible, if done in accordance with established regulations and the collective bargaining agreement. (Agency Exhibit No. 2).

On December 16, 1988, Manager Stanley Jackson met with grievants Voncile Foos and Phyllis Brown. (HT-111). Mr. Jackson admits having told each of these grievants that he anticipated other employees' promotions and requested that they keep their proposed promotions confidential, until after they became effective. (HT-112). The promotions of Ms. Foos and Ms. Brown became effective December 19, 1988. During the hearing on the merits of the 1987 grievance, grievant Foos admitted on the stand that she had been promoted to the coveted grade 11 level. This announcement caused a display of emotion from Foos' co-group-grievants who were present. (HT-82, 88, 93). As a result, on January 9, 1989, Local 2776 President Gore filed a grievance challenging that after having said he would not promote any of the grievants "until the arbitrator gives a decision," Department Manager Thomas had promoted some of the twenty-six (26) grievants, without having notified the union. (Union Exhibit No. 8).

On January 26, 1989, the union filed its formal unfair labor practice complaint which is the subject of the instant recommended decision. (Examiner's Exhibit No.2). In a February 1, 1989, memorandum to the union, management contended that Mr. Thomas did not intend to be indefinitely bound by his statement that he would not promote DS-1169-9 Revenue Officers while the grievance seeking their career ladder promotions was in litigation. (Management Exhibit No. 4). The Department's formal answer to the ULP complaint was filed with D.C. PERB on February 16, 1989. (Examiner's Exhibit No.3). It challenged the complaint as, inter alia, frivolous, non meritorious, and not within the scope of Section 1-618.4, in that management had made no promise, threat, or attempt to

encourage employees to withdraw their grievance. The Department's answer further stated the promotions were a matter of management's rights; the union was not entitled to be notified or to agree; and the promotions could legitimately be made at any time during the pending settlement negotiations. (Examiner's Exhibit No. 3).

By agreement dated April 7, 1989, all of the twenty-six (26) grievants who had not previously been promoted, became DS-11 revenue officers, 3/ and were given one year of back pay. In addition, the agreement required the union to withdraw the grievance from arbitration. (Management Exhibit No. 1).

On June 22, 1989, the Notice of Unfair Labor Practice Hearing was issued by D.C. PERB, after having completed its preliminary investigation, pursuant to Sections 502(c) and (g) CMPA, D.C. Code Section 1-605.2(3) and PERB Rules 103.6 and 103.9. (Examiner's Exhibit No. 1).

An investigatory hearing was conducted by the undersigned Hearing Examiner on Friday, July 21, and Thursday July 27, 1989 in the Office of D.C. PERB. A verbatim transcript was made of the hearing. Post hearing briefs were submitted by both parties. (Examiner's Exhibits No. 4 & 5).

III. ISSUES PRESENTED

Whether the Department engaged in unlawful unilateral action, direct dealing, coercion, or interference with employee rights during the course of grievance settlement regarding career ladder promotions of DS-9 revenue officers whose promotions were conferred without the knowledge or consent of the union in violation of CMPA Sections 1-618.4(a)(1),(2),(3) and (5), as alleged in the union's unfair labor practice complaint.

3/ With the exception of one employee who had been promoted above the 11 level.

IV. POSITION OF THE PARTIES

A. The Union

The union charged the Department with having committed two separate, distinct violations of Section 618.4(a)(5) of CMPA; i.e., one on one meetings and withholding information. With respect to the first alleged violation, the union charges that management conducted one on one meetings with employee grievants who were told not to disclose the fact that management had granted the very promotions that were the subject of their outstanding grievance. (Exam. Exhibit No.4). The union asserts that it should have been notified of and included in the meetings, since those meetings involved the matter of promotions for which the union had filed a grievance on behalf of twenty-six (26) grade 9 revenue officers.

Moreover, per the collective bargaining agreement, the grievance belonged to the union and not the individual grievants. It is argued that once the grievance was filed by the Union, the matter became the Union's grievance with the employer. Further, the union complained that the one on one meetings having been conducted during the active processing of a grievance, violated and eroded its ability to perform its duty on behalf of all twenty-six (26) grievants who sought promotion. The union alleged that management's conducting one on one meetings amounted to direct dealing with employees which by-passed the union and "denigrated its status, in spite of the fact that management did not specifically ask employees to make concessions.

It was also argued that Section 1-618.4(a)(1) of the CMPA prohibits management from bargaining directly with employees. The union pointed out that section of CMPA "mirrors" the National Labor Relations Act (NLRA) which prohibits an employer from conferring a benefit in a way that discriminates against a union's activities.

The second violation of Section 618.4(a)(5) asserted by the union is the Department's alleged failure or refusal to give the union information it requested regarding revenue officers promoted from the 9 to 11 level. The union maintains the Department was obligated to provide information the union needed, regarding promotions and wages, to carry out its duty to represent employees and proceed with their grievance. Management's refusal to give the union information regarding who had been promoted, amounted to a refusal to bargain in good faith with the authorized exclusive representative. The union argued the duty to bargain under the statute includes the duty to properly process the grievance filed on behalf of the twenty-six (26) employees.

In addition to charging the Agency with direct dealing and illegally withhholding information, the union also challenged the timing of the conferral of promotions to coincide with the timing of some employees' anticipated testimony at the arbitration hearing. This in effect, was alleged to be an unfair labor practice in which interfered with the union's right to organize and bargain collectively. The union argued management's right to promote cannot be exercised in a manner that damages the union in its representation of employeee.

B. The Department

Management's basic argument is that it has committed no unfair labor practice, but rather, legitimately within the normal course of business promoted eligible, qualified employees pursuant to its managerial rights. According to management, the promotions of the revenue officers were conferred in accordance with the CMPA and Article II Section 1 of the parties' collective bargaining agreement which provide that management retains the sole right "to hire, promote, transfer, assign and retain employees in positions within the agency..." The Department maintains that it examined the work force in comparison to the functions that needed to be completed and determined that additional revenue officers were required at the higher grade to carryout the mission of the Department. Based on this determination, management decided to promote additional DS-9 revenue officers to the 11 level. Thus, the promotions were done as a matter of departmental planning.

The major thrust of management's defense was that contrary to the union's allegations, it did not interfere with the settlement process or grievance, procedure, or coerce employees in the exercise of their rights; nor did management engage in illegal direct dealing with employees. Management contends that each of the individual employees with whom it was alleged to have conducted "one on one meetings," admitted on the record that no agency manager, supervisor or representative made by any promise or threat. Further, each witness admitted he or she was not asked for anything in return for the promotion. No one coerced them or interfered with the exercise of their rights. Thus, management argued the union failed to prove a major element of its case.

In its post hearing brief, management argued that by definition, illegal direct dealing is "...intentional circumvention of the exclusive representative by the employer and the direct communication with the employee with respect to terms and conditions of employment that are negotiable." This case, it contended, is distinguishable from those in which the Board and/or the Courts have found employers guilty

of unlawful direct dealing; e.g., employere having by-passed the union and inter alia submitted lesser terms (than demanded by the union) directly to employees. In comparison, Foos, Brown, et. al., were promoted by management in the normal course of business without consulting the union, because additional revenue officers were needed at the DS-II level. All employees so promoted were given grades and/or salaries congruent with that requested in the unions grievance. Those grievants promoted before the final settlement agreement was signed, as well as those promoted as a result of the grievance, all achieved the same grade, DS-11 and in essence received equal settlement amounts. Moreover, Ms. Foos and Ms. Brown were not subjects of secret grievance adjustments. Manager Jackson merely requested (as opposed to ordering or demanding) that since other employees' promotions were forthcoming, that Foos and Brown wait 2 or 3 days; in order for their promotions to become effective; before disclosing to others that the promotions had been conferred. This was not a request to remain indefinitely silent. The promotions did not interfere with the settlement of the case. In fact, agency management continued to actively pursue and engage in settlement with the union regarding career ladder promotions.

Moreover, management contends that it has not "refused to bargain" as the union alleged. It is argued that those NLRB cases, in which employers have been charged with "refusal to bargain have involved terms and conditions of employment, in contrast to the instant situation which involves the agency having voluntarily entered grievance settlement proceedings. Thus, management had no duty to inform the union about the promotions, or solicit its approval or agreement before Manager Jackson announced the promotions to Revenue Officers to Foos and Brown. The union had no reason to expect to be consulted.

Finally, management asserts that an unfair labor practice is a violation of law. Consequently, ULP complaints should not be frivolusly filed, or used as a forum for the union Local President to vindicate what is perceived as her questioned integrity, or attempt to restore "...harmony to the local which may or may not have been momentarily disrupted by the knowledge that the Department promoted one (1) or more employees." 4/ There was no duty to inform the union of the promotions, nor failure to bargain over terms and conditions of employment. The union picketed to encourage the agency to confer promotions. However, as soon as the promotions were announced, they challenged the very action for which they picketed as being an unfair labor practice.

4/ Post Hearing Brief for Respondent, dated 9-11-89, p. 9. Examiner's Exhibit No.5.

V. RELEVANT PROVISIONS OF THE STATUTE AND AGREEMENT

ARTICLE II
MANAGEMENT RIGHTS

Section 1 - Management Rights in Accordance with the Comprehensive Merit Personnel Act (CMPA):

D.C. Code Section 1-618.8 of the CMPA establishes management rights as follows:

(a) The respective personnel authorities (management) shall retain the sole right, in accordance with applicable laws and rules and regulations,

(1) to direct employees of the agencies;
(2) to hire, promote, transfer, assign and retain employees in positions within the agency and to suspend, demote, discharge or take other disciplinary action against employees for cause;

1-618.4. Unfair labor practices.

(a) The District, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;
(2) Dominating, interfering or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;
(3) Discriminating in regard to hiring or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;
(4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under this chapter; or
(5) Refusing to bargain collectively in good faith with the exclusive representative.

1-618.6. Employee rights.

(a) All employees shall have the right:
(1) To organize a labor organization free from

interference, restraint or coercion;
(2) To form, join or assist any labor organization or to refrain from such activity; and
(3) To bargain collectively through representatives of their own choosing as provided in this subchapter.

(b) Notwithstanding any other provision in this chapter, an individual employee may present a grievance at any time to his or her employer without the intervention of a labor organization, Provided, however, that the exclusive representative is afforded an effective opportunity to be present and to offer its view at any meetings held to adjust the complaint. Any employee or employees who utilize this avenue of presenting personal complaints to the employer may not do so under the name, or by representation, of a labor organization. Adjustments of grievances must be consistent with the terms of the applicable collective bargaining agreement. Where the employee is not represented by the union with exclusive recognition for the unit, no adjustment of a grievance shall be considered as a precedent or as relevant either to the interpretation of the collective bargaining agreement or to the adjustment of other grievances.

VI. DISCUSSION AND CONCLUSIONS OF LAW

A. Management Rights

Article II, Section 1 of the parties' collective bargaining agreement establishes that management has retained the sole right, inter alia to direct, hire, promote and assign employees in agency positions. In the instant case, management has based the justification for its actions; in promoting revenue officers without having notified the union; on this retained rights section of the contract. Management argued that it was exclusively within the purview of management's authority to manage its operation and promote the employees to the level necessary to carry out the Department's mission. At the hearing, Department Director Harold Thomas stated he had no doubt regarding the authority of his office to promote the employees (HT-147) and viewed the promotions as having had no bearing on what was being negotiated or arbitrated. (HT-150). Department Manager Stanley Thomas stated on the record that "...it was strictly my concern that Management has a right to carry on and conduct the responsibilities of the agency independent of whether or not there is a grievance outstanding." (HT-116). "...I still had a responsibility to manage and administer the Investigation and Collections Division. In order to do so effectively, I needed to have appropriate resources. So it was my desire to continue to lobby to get those resources that were necessary, the grade levels that were necessary to

carry on the mission of the division." (HT-118). In its post hearing brief, the Department stated, "Promotion is a Management right and the Employer may exercise the right without Union Approval or consent." (Examiner Exhibit No.5).

Clearly, management viewed its actions (in having promoted the revenue officers) not only as a matter of management rights, solely within the power and discretion of management, but also viewed this right as operating independent of any on-going discussion with the union. Although theoretically, management has the sole retained right to promote, this right was not unlimited. Limitations have been imposed on management's rights clauses by the operation of other provisions in the contract, as well as by statute and by the courts. **5/**

The union properly argued Management's rights can not be exercised in a manner that damages the union in its representation of employees. Given the totality of the factors involved in the instant case, management could not operate as if in a vacuum. A grievance had been filed by the union on behalf of twenty-six (26) employees. According to the parties' collective bargaining agreement at Article III, Local 2776 Council 20 was the exclusive agent representing the twenty-six revenue officers. It was necessary to consider the impact that operating independent of the union would have on the union's ability to process the grievance.

Although the department as a governmental entity is specifically excluded from coverage by the NLRA, Sections 1-618.4(a)(1) & (5) of the CMPA "mirror" **6/** Sections 8(a)(1) & (5) of the NLRA 29 U.S.C. 156(a)(1) have been cited by the NLRB as authority to restrict management rights by superimposing mandatory bargaining areas such as wages and conditions of employment. See. NLRB v. King Radio Corp. (10th Cir. 1969).

In the instant case, the union argued the duty to bargain extended to the adjustment of a grievance. The examiner agrees. The record shows management's decision to act independently of the grievance operated to create suspicion of "deal-cutting" and distrust for the union's ability to effectively represent its members in the group grievance. This was a reasonably foreseeable result, given the large number of co-grievants, the timing of the conferral of the promotions and the union's lack of prior knowledge

---

5/ See. How Arbitration Works, Elkouri and Elkouri Limitations on Management Rights pages 418-434

6/ See. Fraternal Order of Police, PERB Op. No. 94 (1984) for PERB's acceptance of NLRB decisions as precedent.

that two of that group had been approved for promotion. The union was not afforded reasonable opportunity to notify those non-promoted grievants in advance of the day of the hearing. 7/

Moreover, after the first two promotions, management continued to promote other grievants without the union's knowledge; thereby perpetuating feelings of distrust and lack of confidence in the union. While it is true that management has the sole retained right to promote, this right must be exercised in a manner that does not unreasonably infringe on the union's duty and right to fairly represent its members, without undue interference. One employee stated on the record it was her understanding "...for everyone to be compensated or none at all." (HT-101). She stated upon hearing one of the 26 had been promoted she "...was really hot;" and wanted to know what deals were cut. She went on to say that other named employees openly accused the union of "cut[ting] some kind of deal." (HT 103). She stated at that point... "I didn't know could I trust our attorney, could I, in fact trust the union?" (HT-102).

The union's complaint is neither frivolous, nor moot. Good faith operation goes to the very core of management-union relationships. The union must be afforded the ability to plan and process individual, as well as, group grievances in an "orderly and internally consistent manner; especially where the dispute may affect a number of employees...without unpredictable diversions" United Steelworkers of America v. NLRB, 536 F.2d 550 (3rd Cir. 1976)

Management had the right to promote employees if such was needed to maintain the efficient operation of its facility and to effectively achieve its mission. However, when the promotion is the subject of a group grievance, that is actively being processed, there is a corresponding right for the union to be informed of that promotion.

7/ It was admitted on the record that the employees were called into Mr. Jackson's office on friday afternoon. (HT-111) Grievant Foos called the union attorney sometime during the weekend. Thus, the Union was afforded no time prior to the day of the hearing (Monday) to meet with the group. We make no judgment here as to whether the union should have called members of the group together on the morning of the hearing prior to Ms Foos going on the stand; to lessen the impact of her disclosure during the conduct of the hearing.

B. Normal Course Of Business

Management maintains the promotions were made in good faith, in the normal course of business. After having reviewed the performance of a number of its revenue officers, it was determined that they were eligible for and entitled to promotion. Division Chief, Stanley Jackson, stated there had been a "long term effort to create the upper level resources that were necessary in my division. I had been lobbying for some time to get increased grade levels in that area, so that we could handle the workload that had expanded and increased." (HT-113) It appears that at the time Ms. Foos and Ms. Brown were called into Mr. Jackson's office, he had been advised that their promotion authorizations had been generated, but he had not received their paper work (HT-112, 115).

There appears to be a four-pronged test for determining eligibility for a career ladder promotion:

1. Time in grade requirements must be met, as well as,
2. minimum qualification for the level desired,
3. demonstrated ability to perform at the next level, and
4. demonstrated need for higher level work. (Union Exhibit 2 A Appendix A. Merit Staffing Plan).

Subpart 8. "Promotions" of the District of Columbia Personnel Manual at page 8-35 states that career ladder employees are hired at the entrance, or intermediate level and assigned grade building experience to assist them in qualifying and demonstrating the ability to perform work at the next higher level. Management is to select candidates for career ladder jobs who have potential capability to operate at the full performance level. If a career ladder employee is not promoted "due to inability to perform at higher level within a reasonable amount of time, he or she should either be reassigned or appropriate adverse action should be taken." (Union Exhibit 2-B).

In the instant case, the DS-9 grievant revenue officers were career ladder employees assigned to less than the full performance level. Division Chief Jackson testified there was full performance level work available. (HT-117,118,125) Moreover, Mr. Jackson stated he had been "lobbying for sometime" to implement the promotions and get increased grade levels. to handle the workload which "had expanded and increased" (HT-113).

There was unrefuted testimony that the normal progression of time in grade, before qualifying for the next

performance level, takes approximately one or two years. None of the twenty-six (26) grievants had been promoted in ten (10) or more years. (HT 32). Moreover, DS-9 Revenue Officer Foos, stated that she had been advised three years prior, in 1985, that she had been promoted; but that promotion was never implemented. (HT 62 & 119). Her inquiries as to why she had not received the promotion were explained by Mr. Jackson who, allegedly stated there was a problem in personnel precipitated by a letter from the former director, limiting the full performance level of the revenue officer's career ladder to grade nine (9). (HT-63).

In 1986, Mr. Jackson had recommended eleven revenue officers for promotion which precipitated the union's February 1987 grievance, (HT-132). He stated he had been trying to get promotions for employees "for a couple of years prior to the effective date of the grievance" (HT-116) for employees who had demonstrated eligibility. He had requested assistance in April and September, independent of the grievance process because he needed resources to carry out the agency's mission. (HT-118).

The examiner does not find the promotions of career ladder revenue officers who have sat at the same level for 10 years; when normal time for promotions to the next performance level would be 1 or 2 years in grade; to be in the normal course of business. There is no showing that members of the group of twenty-six (26) grievants failed to meet minimum requirements or did not demonstrate the ability to perform at the next higher level as required in the four (4) pronged test for career ladder promotions set out at Appendix A. the Merit Staffing Plan (Union Exhibit 2A page A-1.)

The record shows the normal progression was not followed in the case of these twenty-six (26) grievants. Given the totality of circumstances; i.e. (1) amount of time lapsed between promotions for employees whose supervisors had recommended them for promotion, (2) withholding raises after an employee had been congratulated, (3) Promoting an employee two days before this employee was to testify in arbitration (4) No promotions in 10 years and (5) a reported letter from former Director freezing the prior grade 11 full performace level at DS-9, and (6) failing to notify the union after having advised the union that no promotions would be made until after the arbitration was completed. The sum total of these circumstances compel the examiner to find the promotions were not mode in the normal course of business.

C. Direct Dealing

The union accused management of direct dealing, in violation of the statute. Management argued that the challenged meetings between employees and Chief Jackson was to advise the employees of the approval of their career ladder grade 11 promotions, which the agency had processed in the normal course of business, independent of the union's grievance. In its post hearing brief, management argued that the supervisor-employee meetings do not comport with what the courts have held to fall within the definition of direct dealing; which is the employer's circumvention of the exclusive representative by directly communicating with employees regarding "terms and conditions of employment that are negotiable". The examiner's review of the cases supports management's contention.

Those cases in which the Board or the courts have found employers guilty of direct dealing, have involved situations in which employers have 1) directly approached employees with proposals or offers of settlement rejected by the union, or, 2) offered employees less than full compensation or less than the amount demanded by the union or, 3) failed or refused to bargin with the union regarding compulsory or mandatory bargaining areas. 8/ Management argued it had voluntarily entered settlement discussions regarding the revenue officers' promotions. The Department denies the union's accusation that it violated 1-618.4(a)(5) of the CMPA by conducting alleged one-on-one meetings and instructing employees to remain silent.

The examiner does not find that the record presented supports a finding that the employer is guilty of direct dealing. However, the examiner does find merit in the union's argument that management has violated its duty to bargain in good faith and notify the union of its unilateral promotions. The collective bargaining agreement at Article III Section 1 provides that District 20 AFSCME is the

---

8/ Compare, 1) NLRB v. Katz 369 U.S. 736, 745 (1962) citing NLRB v. Bradley 192 F. 2d 144,148 (&th Cir. 1951), 2) Weinreb Management, 292 NLRB 54, 131 LRRM 1051(1989), and 3) Korn v. NLRB 389 F. 2d 117(4th Cir. 1967)

certified exclusive representative of the bargaining unit. 9/

In addition, CMPA at 1-618.6 (b)provides in relevant part:

> an individual employee may present a grievance at any time to his employer without the intervention of a labor organization: Provided however, that the exclusive representative is afforded an effective opportunity to be present and to offer its view at meetings held to adjust the complaint.

Here, the grievance had been filed by the union. The statute provides that individual employees have the right to present their grievances to management independent of the union. In such cases, the employee and management are free to resolve matters without union involvement. In addition, the statute provides that in such instances, in which the employee present his own greviance, the union is not bound to have the outcome considred as precedent or relevant to the adjustment of other greviances in the work place. (See CMPA 1-618.6(b)).

This implies that the District of Columbia legislature recognized the importance of union involvement in grievance adjustment. While individual employees have the statutory right to file grievances 10/, the grievance in the instant case was a large group grievance filed by the union. Thus, the grievance belonged to the union. The adjustment of the grievance was as much a part of collective bargaining as is negotiating an agreement. See. Ostrofsky v. United Steel Workers of America, 171 F.Supp. 782, Aff'd 273 F.2d 614, Cert. den., 363 U.S. 849.

9/ Master Agreement between The American Federation of State County and Municipal Employees District of Columbia District Council 20 AFL-CIO and The Government of the District of Columbia 1986-1987 Exhibit C of ULP Complaint dated January 26, 1989.

10/ CMPA 1-618.6(b)

The union argued it had a right to not only be notified, but also to be present during the one on one employee-supervisor meetings in which the DS-11 promotions were conferred/discussed. There is an absolute right for the union to be present if Weingarten rights are invoked. However, the courts and the NLRB have developed explicit criteria for mandatory imposition of Weingarten rights. **11/** Those criteria have not been met in the instant case, since employees did not request the union's presence and the meeting did not involve a perceived disciplinary action. Moreover, each employee who testified, said he or she did not feel threatened, intimidated or coerced. (HT-67,76,84). Certainly, none asserted they felt the meeting was called for a disciplinary reason. One employee merely testified she had asked if the union was aware of the promotions. (HT-81)

The union's right to be present has been established in non disciplinary cases by statute at CMPA 1-618.6(b). The legislative history of the CMPA is not available to the examiner to establish D.C. Council's legislative intent. However, Section 1-618.6(b) is very similar to portions of language and concepts contained in the NLRA 9(a); ie. 29 U.S.C. Section 159 (a) **12/** which requires that the collective bargaining representative be given the opportunity to be present during the adjustment of employee grievances. **13/** See Also In re:Bethlehem Steel Company, 89 NLRB 33, 25 LLRM 1564.

11/ NLRB v. Weingarten 420 U.S. 251, 88 LRRM 2689 (1975)

12/ 29 USC Section 159(a) provides in relevant port:
"(a) Representatives designated or selected for purposes of collective bargaining... shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right to present grievances to their employer ... as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract... Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." (emphasis added).

13/ In re:Bethlehem Steel Company 89 NLRB 48 89 NLRB 33 25 LRRM 1564. In this case the employer only wanted the union to be present if the employee so elected - contending it would interfere with plant effiency to require the union's presence at initial adjustment.

Reasons stated by the Congress for including a proviso for union presence during adjustment of grievances involving wages, hours and conditions of employement was to prevent "...rivalry, dissention, suspicion and friction among employees, to permit employers to play off one group of employees against another, to confuse employees would completely undermine the collective bargaining representative..." **14/** The language ensuring the union a right to be present, guards against employers "...undermining the status of the duly chosen bargaining representative by dealing directly with individual employees in the settlement of their grievances..." While Section 9(a) of the NLRA is specifically not applicable to governmental employers, the similarity of the language giving unions the right to be present, is similar enough to the D.C. statute (at 1-618.6 (b)) to allow superimposition of the federal rationale upon the facts in the instant case.

Management argued the meetings with employees were not grievance adjustment meetings. All employees received equal remedies, i.e. promotion to grade 11 and one year back pay. The employer continued to negotiate settlement with the union and in fact the grievance was finally settled for all grievants. Management contended it had no obligation to inform and the union had no right to expect to be notified of the promotions.(HT-168-9). The examiner does not agree.

Given the totality of the circumstances, the union should have been notified by management and given the option to attend, what in effect, was a partial grievance adjustment for a small number (two to six) of the 26 grievants. After having relied in good faith that management was trustworthy in its statements (written and oral) that DS-9 revenue officers would not be promoted until after the arbitrator issued his decision, the union had a right to be notified. The department's justification for departing from its plan to not promote until after the arbitration was over was that the arbitration became protracted and the need for grade 11 employees remained. (HT-148,175). Management stated there were inquiries from supervisors, as well as pressure from the union; via picketing for promotions. (HT-175). As a result, the promotions of Foos and Brown were announced while others were anticipated. (HT-124).

The examiner does not accept the department's justification, (for not notifying the union of the promotions); nor is its contention acceptable that the union had no right to expect to be notified. There is no reason why the union should not have relied on Management's

---

14/ Congressman Lanham 93 Daily Cong. Rec. 3702 April 17, 1947.

assurances. (HT 116). Mr. Jackson admitted that in a meeting with Union President Gore and Ms. Brown, the Department head, Mr. Thomas said he would not promote. (HT-113,117). Surely, this acted to shape how the union related to its members the progress of processing the grievances and its subsequent monitoring efforts. The Courts have held that unions should be afforded the "ability to plan the processing of grievances in an orderly and internally consistent manner... without unpredictable diversions," especially where a dispute may affect a number of employees. United Steelworkers of America v. NLRB, 536 F. 2d 550 (3rd Cir. 1976). In the instant case, employees were told to keep their pending promotions confidential. When management was asked if the union was aware, management said no. Partial adjustment of a group grievance for employees who are told to to keep silent while the union continues to use its resources to process their complaint, could foreseeably waste valuable union resources, deteriorate the relationship between the parties, as well as between the union and its members. The union has a statutory duty to fairly represent all of its members/grievants. Management's failure to notify the union, compromised the union's ability to fulfill its statutory duty. The fact that there were as many as twenty-six (26) grievants, moved the parties' respective duties to a higher standard of care. Management's suggestion of non disclosure precipitated the foreseeable result of distrust and member anxiety.

The conferring of the promotions was a partial adjustment of a grievance. The record does not support management's contention that the promotions were accomplished separate and apart from the group grievance. Evidence of record does not show the promotions were made in the normal course of business, but rather in direct response to the group grievance filed by the union.

Adjustments of grievances may lead to establishment of new interpretations in the administration of the collective bargaining agreement, as well as new trends and conditions in the work place which in effect supplement or add dimensions to the collective bargaining agreement between the parties. Rulings and decisions made in adjustments of grievances are frequently the embryonic stages of a body of departmental "common law" that eventually develop and "supplements" the collective bargaining agreement between the parties. One of the prime functions of the grievance procedure is to secure uniformity in interpreting the parties' contract and building the "law of the plant." Ostrofsky, Supra.

The union has the right to have grievances settled consistent with the collective bargaining agreement. **15/**

15/ Bendix supra.

Thus, if the union is not notified that the very core of its grievance is being adjusted, whether in part or in full, there will be no opportunity to ensure that the adjustment comports with the contract. Individual employees may not necessarily be familiar with the parties' bargaining history, or their established past practices. Thus, the union has a supreme right in instances in which it (as opposed to the individual) has filed the grievance, to be involved in the adjustment of that grievance. The drafters of CMPA obviously considered this scenario in designing D.C. Code Section 1-618.6(b), in that it states in instances in which an employee represents himself by presenting a grievance without the assistance of, or intervention of the union:

1.) The union must be afforded the effective opportunity to be present and to offer its view at meetings held to adjust the complaint;and

2.) In those instances in which the union is not selected by the employee to handle the grievance such an adjustment can not be considered as precedent for the adjustment of other grievances or relevant to interpretation of the collective bargaining agreement.

Thus, having rejected the employer's contention that it acted in the normal course of business and operated independent of the union's grievance, the examiner finds the employer should have notified the union of the manager's decision to promote two of the twenty-six (26) grievants.

D. Unlawful Interference

The union charges management with having violated CMPA Section 1-618.4(a)(1) which prohibits "interfering, restraining or coercing any employee in the exercise of the rights" guaranteed under Section 1-618.6 of the CMPA which includes the right to organize a union "free from interference, restraint or coercion"and to "bargain collectively".

Management, denied having interfered with the settlement process, the grievance procedure, or any rights guaranteed by CMPA. Management pointed out that employees who testified at the hearing admitted they were not coerced, or threatened, or promised anything in exchange for, or in addition to promotion. No employee was asked to keep quiet indefinitely, or asked to not disclose his promotion beyond the day the final papers arrived. Management argued that the union failed to prove its case, because there was no showing of interference, coercion, threats, restraint or promises.

The union charged the department with having unilaterally imposed its resolution of the grievance upon employee members of the union; by promoting a portion of the workers. Management convincingly argued that no employee was given a grade less than that requested by the union; i.e. DS-11. Moreover, the promotions did not preclude those

employees from inclusion in whatever further benefit, e.g. back pay, the union later acquired on behalf of all grievants.

The examiner was not conviced by the union's argument that management's unilateral action and alleged direct dealing was responsible for diminishing the amount of back pay to one year. There is no showing by a preponderance of the evidence that the promotions, or the union's lack of knowledge thereof precluded the union from subsequently negotiating full back pay.

The union's argument is meritorious that management is guilty of the an unfair labor practice of illegal interference.

The union pointed out the similarity of 1-618.4(a)(1) of the CMPA and section 8(a)(1) of the NLRA, 29 U.S.C.158(a)(1). Case law developed around this section of the federal statute makes it an unfair labor practice to confer benefits in a manner that tends to interfere with the union or an employee's free exercise of his rights to organize, form, join, participate in, or bargain collectively through the union. See. Soule Glass and Glazing Co. v. NLRB, 652 F. 2d 1055, 1077, 111 LRRM 1104

Management aptly pointed out that none of the promoted employees admitted on the record, that he or she was threated or coerced. However, cases cited by the union hold that in order to meet its burden of proof, the union need not show the Department succeeded in coercing or restraining an employee's free exercise of his statutory right to participate in the union, but rather the union need only show the employer's conduct tended to coerce, restrain or interfere with the free exercise of the employee's rights. See Presbyterian St. Luke's Medical Center v. NLRB, 723 F. 2d 1468 (10th Cir. 1983). Moreover, the Courts have used the timing of an employer's conferral of a benefit upon employees to show requisite intent to interfere with the union. Presbyterian St. Luke's, Supra.

Timing of the conferral of benefits in the instant case is suspect. When Chief Stanley Jackson met with revenue officers Foos and Brown on friday December 16, 1989, the parties were in the midst of an arbitration regarding those promotions. In fact, just four days prior to that December 16th promotion meeting, the parties had argued before the arbitrator and were scheduled to reconvene the hearing on Monday December 19, 1988. Ms. Foos was scheduled to testify in the on going hearing and no doubt, management had been advised of the names of employees the union intended to call as witnesses.

Mr. Jackson stated on the record, he received a call

advising him to inform Ms. Foos and Ms. Brown that their promotions had been approved. (HT-111,115). He also admitted he asked these two employees not to discuss their promotions with others, because other employees' promotions were anticipated. (HT-112). Another revenue officer, Shirley Watson whose promotion was effective the same day as Brown and Foos, said she asked Mr. Jackson if the union was aware of her promotion and he said no. (HT-81). The examiner finds it was forseeable that management's actions could result in problems between the union and the remainder of the twenty-six (26) grievants. Management's failure to notify the union, coupled with the suspect timing of the conferral of promotions, and withholding information (discussed below) amounted to unlawful interference.

E. Withholding Information

The union charged the employer's failure to provide requested information was a violation of CMPA Section 1-618.4 (a)(5):

> "Refusing to bargain collectively in good faith with the exclusive representative."

Both the union's president and its attorney testified, under oath that information was requested and not received from management regarding the number and identity of employee DS-9 revenue officers who had been promoted to the DS-11 level since the initiation of the grievance.(HT-48,181-182). It is contended that this information was needed to allow the union to effectively bargain, as well as notify revenue officers of events surrounding the grievance.

Management argued the refusal to bargain cases do not apply to the instant situation. The examiner does not agree.

It is a well established principle of labor relations law that an employer may violate the duty to bargain in good faith by refusing to furnish information relevant to the union's negotiation, or administration of its collective bargaining agreement. NLRB v. Associated General Contractors of California, Inc. 633 F.2d 766 (9th Cir. 1980) cert. den. 101 S Ct. 3049, 452 U.S. 915, 69 L.Ed. 2d 418; or the proper performance of its bargaining representative duties. See NLRB v. Truitt Mfg. Co. 351 U.S. 149 (1956); and AFGE v. FLRA 793 F. 2d 1360, 1363 (D.C. Cir., 1986).

The obligation to bargain in good faith extends to the union's need for information during the administration and policing of the contract and is not limited to contract negotiations. This obligation exists independent of an employer's good or bad faith. Proctor and Gamble Mfg Co. v. NLRB, 603 F.2d 1310 (8th Cir. 1979)

The union must be furnished with sufficient information

to allow it to act intelligently on its grievances. Local 777, Democratic Union Organizing Committee, Seafarers Int'l Union of North America, AFL-CIO v. NLRB, 603F. 2d 862 C D.C. Cir.,1978). An employer must provide relevant information to union representatives so that they can bargain effectively, if the requested information is available Korn v. NLRB, 389 F. 2d 117 (4th Cir. 1967).

There is a showing on the record that the union attempted to find out if two (2), or some number up to six (6), employees were promoted prior to the date of the settlement agreement. In addition, there was discussion on the record of the possible existence of a list of employees who were proposed for promotion. (HT 132). A list of promotees was not provided to the union by management. Employees who were promoted were asked to keep their promotions confidential until their co-grievants' papers came through the system and Mr. Jackson could tell all of them they had been promoted. (HT-76,64) Management made no effort to comply with the union's repeated reguests for information regarding these promotions. The question of whether or not the information requested by a union is so pertinent and necessary to the union's negotiation with the employer that the employer's refusal to provide the requested information constitutes refusal to bargain in good faith depends on the facts of each case. Square D Co. v. NLRB, 332 F. 2d 360 (Cal. Cir., 1964) The relevance of the data requested by the Union must be considered on a case-by-case basis. AFGE v. FLRA Supra, at 1364.

There was no proof that a list of proposed DS-9 Revenue Officer promotees existed. The union's counsel alleged she requested from management a list she observed in management's possession during hearing and after several requests did not get the list.(HT 181). Mr. Jackson stated he was aware of a list several years old of persons he had recommended for promotion. He in effect denied the existence of an updated list of proposed promotions. Throughout the proceeding, it appears the union had not been provided with an accurate list to determine whether six (6) or nine (9) employees had been promoted prior to the April 1989 settlement. In addition, the record shows a number of promoted revenue officers did not go to the union to disclose their "confidential" promotions. Rather, the Union President approached these promoted revenue officers after learning of the promotions from their disgruntled non-promoted co-grievants. (HT-46,47,48,49). The examiner finds that irrespective of whether a list of six (6) or eleven (11) proposed promotees existed, management should have composed and provided the union with a list of persons whose promotions were eminent, as well as names of employees who had already been promoted. Management was in exclusive control of this information. It was reasonable for the union to request the names of promoted individuals, so that it could continue to process the grievance in an intelligent,

informed, orderly fashion. In the interest of good faith bargaining, the Department had a duty to act responsibly in its role in resolving the grievance.

The department director stated he had no duty to inform the union of the promotions (HT 168). The examiner does not agree. There was a duty to advise the union that promotions had been awarded to some of the group of grievants. The promotions were the subject of the group grievance, as well as the arbitration, on which the union was expending its funds and resources. The respondent is a public employer. Strong public policy exists against prolonging the use of governmental resources for the resolution of matters that can be more quickly extinguished by good faith cooperation; in supplying something so simple as the names of persons whose promotions had already been approved, or were in the process of being approved. Managers testified that their efforts were being expended to promote the DS-9 revenue officers independent of the union. If both parties were working toward a common goal, what prevented management from notifying the union; in the spirit of good faith cooperation; that their common goal was being attained?

This is not to say that in the future, management must take on the burdensome task of providing the union with the name of each employee it plans to promote within his career ladder. However, in the instant case, in which the parties have expended extensive time and resources attempting to resolve a group grievance, and counsel for the union has made several requests that management share information that:

1.) is in management's exclusive control, and
2.) that information is directly related to the grievance the parties are attempting resolve
3.) The union has presented a grievance regarding promotions for 26 similarly situated employees, and
4.) Management elected to promote an undisclosed number of the group of 26.

The union had a need to know the identity of grievants promoted (or about to be promoted), so that it could intelligently process the grievance without being hit "blind-sided," i.e., without appearing to the grievants to be incompetent, inefficient, unaware what was going on, incapable of administering the collective bargaining agreement, or having "cut a deal" that favored some and not all of the grievants in violation of its duty of fair representation. Management's failure to supply Attorney Keller with a list of proposed revenue officers after the union made repeated requests, was a refusal to bargain in good faith. Good faith bargaining is more far reaching than the negotiation of the provisions in the parties' contract.

If the list Ms Keller observed at the table was not the list of 1988 proposed career ladder DS11 promotions, but

rather was a list of promotions proposed in 1986; as Mr. Jackson infered; then management should have acted in good faith to compose an accurate updated list to provide the union with what it needed to intelligently process the grievance and represent its members. In essence, the failure to provide the union with the requested information contributed to the failure to bargain in good faith. It tended to undermine the status of Local 2776 and promoted dissention and suspicion among the members of the Local of "deal-cutting".

SUMMARY-

Employee career ladder promotion is a management right which the department generally can exercise without union approval or consent. However, management's right to promote revenue officers in the instant case from DS-9 to DS-11 could not be exercised without consideration for the corresponding rights of employees and their exclusive representative, Local 2776. The union relied on management's assurances that it would not promote until after the arbitrator made his decision. The union continued to conduct its processing of the grievance, consistent with this assurance. When management decided to amend its decision, and proceeded to promote some, but not all of the group of twenty-six (26) grievants, it should have notified the union. The promotions went to the very heart of the controversy and were not conferred in the normal course of business. Conferring two promotions on the eve of testifying at the hearing, was suspect and violated (1-618.4(a)(1).

Management argued it did not unlawfully interfere or coerce employees in the exercise of their rights. The examiner does not find coercion, however, there was definite interference in violation of D.C. Code Section 1-618.4(a)(1). That interference consisted of failure to provide the union with notification of the promotions, the suspect timing of the conferral of promotions, and refusal to comply with union counsel's repeated requests for a list of promotees in order to facilitate her efforts to negotiate settlement of the grievance, fairly represent the members and intelligently advise them of the progress. The union had a statutory right under Section 1-618.6 to ensure that adjustment of the grievance complied with the contract and with established past practices. The totality of circumstances in the instant case prove management has interfered in the union's processing of the grievance and its administration of the contract.

RECOMMENDED REMEDY

1. That the Unfair Labor Practice Complaint be SUSTAINED with respect to Department of Finance and Revenue management's interference.

2. That D.C. PERB issue an appropriate remedial order pursuant to its authority under the CMPA and the Board's regulations.

Respectfully submitted,

Gloria Johnson
Hearing Examiner

Dated: October 30, 1989.