GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
FRATERNAL ORDER OF POLICE/ DEPARTMENT OF CORRECTIONS LABOR COMMITTEE,	PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32
	Opinion No. 722
Complainant,	
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,	
Respondent.	

DECISION AND ORDER

This matter involves a consolidated unfair labor practice complaint filed by the Fraternal Order of Police/ Department of Corrections Labor Committee ("FOP" or "Union") against the Department of Corrections ("DOC" or "Agency")[1]. The complaint alleges that DOC violated the CMPA[2] by: (1) refusing to bargain in good faith concerning the impact and effects of a reduction

[1]The unfair labor practice complaints were individual filed as PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32. Upon Complainant's Motion, the Hearing Examiner ordered that PERB Case No. 01-U-21 be dismissed on the basis that all of the factual predicates and legal arguments in that charge are also included in PERB Case No. 01-U-28. There were no objections to this motion. The Board adopts the Hearing Examiner's ruling that PERB Case No. 01-U-21 should be dismissed.

[2]Specifically, FOP contended that DOC violated D.C. Code §1-617.04 (a)(1),(3), (4), (5) (2001 ed.) by the acts alleged above. The Union also contends that DOC discriminated against bargaining unit members with respect to terms and conditions of employment in order to discourage membership in the union and interfered with, restrained, and coerced bargaining unit

in force (RIF)[3] ; (2) refusing to provide information necessary for Complainant to conduct its representational functions concerning the impact and effects of the RIF; (3) taking reprisals against the Union Chairman[4] by attempting to eliminate four years service credit he had earned; and (4) by taking other[5] actions based on anti-union animus, such as failing to RIF parenthetical positions[6].

---

employees in the exercise of protected Union activity.

Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition.

[3]The Reduction-in-Force (RIF) actions were being implemented in order to bring about the closure of the Lorton Complex pursuant to the National Capital Revitalization and Self Government Act of 1997.

[4]The FOP Chairman at the time of this Complaint was Mr. William Dupree.

[5]At the hearing, FOP also introduced evidence to support allegations that Earnest Durant and William Dupree were retaliated against for engaging in protected activity, even though those allegations were not raised in the Complaint for PERB Case No. 01-U-32. The Hearing Examiner determined that there was no need to consider this allegation because it was raised and resolved in the Board's decision issued in PERB Case No. 01-U-16. Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of George Green, William Dupree and Earnest Durant) v. D.C. Department of Corrections, 50 DCR 5059, Slip Op. No. 698, PERB Case No. 01-U-16 (2003). The Board finds that this determination is reasonable and adopts the Hearing Examiner's finding on this issue.

In addition, the Union contends that DOC violated D.C. Code §1-617.04(a)(1)(2001 ed.) by failing to:(1) properly classify employees; (2) conduct and complete performance appraisals; (3) keep proper records of and provide information concerning employee details. Finally, FOP contends that DOC violated the CMPA by rescinding the reduction-in-force notices of certain non-bargaining unit employees.

[6]Parenthetical positions are those that are in a different classification because they require specified training. For example, parenthetical positions at DOC would be Criminal Investigator (Internal Affairs); Criminal Investigator (Drug Detection); and Correctional Officers (Bilingual). The Hearing Examiner did not find a violation based on DOC's failure to include parenthetical classifications in the RIFs. The Hearing Examiner reasoned that the selection of which employees will be subject to a RIF is an exclusive management right pursuant to D.C. Code 1-617.08 (a) (2) and (3). Absent evidence of discriminatory motive or intent, the Hearing Examiner noted that the Agency's decision concerning these matters is not open to challenge. (R & R at pg. 42).

The Respondent denies the allegations. The Respondent contends, *inter alia,* that it did bargain in good faith with FOP over the RIF. DOC also argues that it did, in fact, produce documents that were available to it at the time of the request[7]. Furthermore, DOC asserts that it met its bargaining obligation and provided notice and an opportunity to bargain over the RIF. DOC contends that since the administrative order was delivered at the same time as the RIF notices, no violation should be found. Finally, DOC argues that it did not show anti-union animus toward Mr. Dupree or interfere or discourage any other union employee through its actions.

A hearing was held in this matter. As a result, the Hearing Examiner found that the Respondents violated the Comprehensive Merit Personnel Act (CMPA).[8] Specifically, the Hearing Examiner found that DOC violated D.C. Code §1-617.04 (a)(1) and (5) by: (1) failing to bargain collectively and in good faith with the Complainant concerning the impact and effects of RIFs and (2) refusing to provide information necessary for Complainant to conduct its representational functions concerning the impact and effects of the RIF. In addition, the Hearing Examiner found that DOC violated D.C. Code §1-617.04 (a)(4) by taking reprisals against Mr.

---

[7]One of the major categories of documents sought by the Union was retention registers. The Agency argued that the retention registers did not exist at the time that they were requested. In finding the violation of D.C. Code §1-617.04 (a)(5), the Hearing Examiner observed that DOC did not establish that the kind of information contained in retention registers did not exist or could not be furnished without undue burden, despite Respondent's contention that the retention register itself did not exist.

[8]The Hearing Examiner considered the following issues:

> (1) Whether the Respondent violated D.C. Code §1-617.04 by failing to bargain collectively in good faith concerning the impact and effects of the RIFs implemented to bring about the closure of the Lorton Complex?
>
> (2) Whether the Respondent violated D.C. Code §1-617.04(a)(1) and (5) by refusing to provide information necessary for Complainant to conduct its representational functions concerning the impact and effects of the RIFs?
>
> Whether the Respondent violated D.C. Code §1-617.04 (a)(3) or (4) by interfering, restraining, coercing, discharging or taking reprisal actions against any employees because they exercised their right to engage in protected activity?

Dupree when it sought to eliminate four years of previously authorized valid service credit he had earned. As to the remaining alleged violations of D.C. Code §1-617.04 (a)(1), (3), (4) and (5), the Hearing Examiner found that the Complainant did not meet its burden of proof. As a result, he recommended that those complaints be dismissed.

As a remedy for DOC's unfair labor practice violations, the Hearing Examiner recommended that an Order be issued which, *in ter alia*, ordered DOC to: (1) cease and desist from refusing to bargain; (2) cease and desist from refusing to produce documents; and (3) bargain on an expedited basis and with retroactive effect over the impact and effects of the previous RIFs. The Hearing Examiner also recommended that the Board order DOC to: (1) cease and desist from retaliating against William Dupree for engaging in protected activity; (2) restore Dupree's 4 years of credited service; and (3) recompute his retention standing.[9] Finally, the Hearing Examiner did not recommend that the Board award costs because he determined that the interest of justice test was not met.[10]

DOC presented numerous exceptions to the Hearing Examiner's Report and Recommendations[11] ("R & R" or "Report") which are partially summarized in this Opinion and

---

[9]The Hearing Examiner determined that no backpay was appropriate at this time; however, if backpay was later found to be appropriate the Union may request backpay or other appropriate remedy. The Board adopts this finding.

[10]The Board has awarded costs when it determines that: (1) the losing party's claim or position was wholly without merit; (2) the successfully challenged action was undertaken in bad faith; and (3) 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. See, AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). We believe that the Hearing Examiner's finding is reasonable and supported by the record and relevant law. Therefore, we adopt this finding.

[11]Other Exceptions that DOC noted in its filing follow below:

- There is no authority for the Hearing Examiner's position that the failure to comply with RIF laws and regulations violates the duty to bargain in good faith.
- The conclusion that the retention register could have been given sooner was a gross misunderstanding of the evidence and was reversible error.
- The Agency Representatives' testimony, which suggested to the Hearing Examiner that a retention register could have been given sooner is a gross misunderstanding of the evidence and record and constitutes reversible error. Furthermore, FOP asserts that Mr. Michael Jacobs' statement was referring to an administrative

are not all mentioned in detail in this Opinion. Essentially, DOC contends that: (1) the Hearing Examiner failed to give the proper weight to the efforts DOC made to bargain over the RIF; (2) it provided all the information that was available at the time of FOP's request, (3) that the failure to credit Mr. Dupree with four years of creditable service was not based on anti-union animus, but based on District Government regulations which govern an employee's break in service; and (4) finally, that the Hearing Examiner failed to consider the totality of the circumstances. (See, Respondent's Exceptions and Memorandum in Support of its Exceptions). A review of the record reveals that the Agency 's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999).

After reviewing the record in the present case, we find that the Hearing Examiner's findings are reasonable and supported by the record. The Board has held "that the effects or impact of a non-bargainable management decision, such as a RIF, upon the terms and conditions of employment is bargainable upon request." See, International Brotherhood of Police Officers and D.C. General Hospital. 39 DCR 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). The Board's law is clear that an Employer violates the duty to bargain in good faith by refusing to bargain, upon request, over the impact and effects of a RIF and by refusing to produce documents related to the RIF. As a result, we conclude that the Hearing Examiner's findings are: (1) reasonable, (2) consistent with Board precedent, and (3) supported by the record.

Despite our finding in support of the Hearing Examiner's Report and Recommendation (Report), we believe that some statements made in the Hearing Examiner's Report need to be clarified. For instance, it is not our function to determine whether a RIF was conducted according to the District of Columbia RIF regulations, that is the D.C. Office of Employee Appeals' function, as properly noted by DOC in their Exceptions and codified in the CMPA.

---

order, not the retention register because that is what he was holding in his hand while he was testifying.

- After May, 25, 2001, the relevant period according to DOC, the parties met and exchanged proposals.

(See, D.C. Code §1-606.03[12]) However, that does not negate the fact that what is relevant in this case is whether DOC met its obligation to bargain over the impact and effects of the RIF. In this case, the Hearing Examiner determined that DOC did *not* meet its obligation. We agree. In making the determination, the Hearing Examiner noted that he considered factors such as: (1) the number and frequency of negotiation sessions; (2) scope; (3)timing; and (4) surrounding facts and circumstances, including the Department's willingness to negotiate over specific issues. (See, Report at pg.30). While DOC believes that the Hearing Examiner did not give proper weight to evidence concerning its bargaining efforts, the Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services, Slip Op. No. 636 at p.4, PERB Case No. 99-U-06. It is not our role to second guess those credibility resolutions.

In addition, we believe that some issues concerning when the duty to bargain begins and when the obligation to produce documents begins in RIF cases merit further discussion. In prior cases, the Board has looked at this issue on a case by case basis, but has never pin-pointed when the actual duty begins. In one case involving a RIF, the Board held that there is *no* duty to bargain over the impact and effects of a management decision unless and until management *decides* to implement a change. See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department (FOP v. MPD), 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections (FOP v. DOC)[13], a related case between these parties, the Hearing Examiner concluded that the RIF was never implemented; therefore, pursuant to our holding in FOP v. MPD, the request to bargain was premature and there was no duty to bargain over the proposed RIF. See, Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections , 49 DCR 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 40 (2002).

In the present case, there is no issue concerning whether a decision was made to RIF employees. The decision was made and an administrative order was signed. However, it still may be helpful for the Board to pinpoint when, in the case of RIFs, the obligation to bargain and to produce documents begins.[14] After much review and discussion of this matter, the Board has

---

[12]D.C. Code §1-606.03 outlines the jurisdiction for the Office of Employee Appeals.

[13]In this case, the administrative order had not been signed and issued. In addition, no retention register had been created.

[14]The Board's case law is not clear on when the duty to bargain concerning a RIF begins or stated another way, when the decision to conduct a RIF has been made. One case states that the duty begins before the RIF notices go out, but does not specify how long before the notices go out. American Federation of Government Employees, Local 872 v. D.C. Department of

determined that the obligation to bargain upon request begins, at the latest, when the administrative order is signed. At that point, the Agency has made a decision to conduct a RIF and is authorized to do so. This is not to say that it cannot cancel or suspend implementation of the RIF once the decision is made. However, the administrative order does give some guidance concerning whether and when the decision has been made to conduct a RIF and represents a point at which the Agency's plans have crystallized enough so impact and effects bargaining can be meaningfully conducted.

Concerning document requests in general and especially those related to an impending RIF, the Board finds that duty to produce those documents is ongoing because an exclusive representatives' duty to represent its members is ongoing. Furthermore, the Board has found that an Employer violates the CMPA by failing to provide, upon request, information relevant and necessary to the union's role as exclusive bargaining agent. See, Doctors Council of D.C. General Hospital v. D.C. General Hospital, 46 DCR 6268, Slip Op. No. 482, PERB Case No. 95-U-10 and 95-U-18 (1999). Therefore, when a union hears rumblings of a RIF[15] and seeks to

---

Public Works, 49 DCR 1145, Slip Op. No. 439, PERB Case Nos . 94-U-02 and 94-U-08 (2002). Another case mentions language from the District Personnel Manual language which suggests that once an administrative order is signed, Management has the authority to conduct a RIF.Fraternal Order of Police/Department of Corrections Labor Committee v. Department of Corrections ,49 DCR 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 40 (2002). The Federal Labor Relations Authority and National Labor Relations Board have language in their cases which suggests that the duty begins before the RIF notices go out. See, Lexington Blue Grass Army and Air Force Exchange Service WACO Distribution Center v. AFGE, Local 4042, 38 FLRA 647 (1997) and Odebrecht Contractors of California, Inc. And International Union of Operating Engineers, Local 12, AFC-CIO ,324 NLRB 396 (1997). However, the parties did not cite, nor did the Board locate any case which pinpoints with specificity when the decision to RIF has been made or when exactly the duty to bargain and/or provide documents actually begins.

[15]In the Board's view, it is not so unreasonable to expect the Agency to provide documents which may relate to an impending RIF, even if no final decision to implement the RIF has been made. The Union could use that information to see where its members fall on the retention register. For instance, a union might seek documents pertaining to outstanding ratings in order to determine whether some of its members have an outstanding rating and thus, qualify for the extra points to be added to their retention score. The same is true for information concerning military service, years of service, and which classifications are slated for abolishment. This type of information can help the Union prepare for an impending RIF. If there are mistakes in the record, they can be corrected before the actual RIF notices go out. In this case, the RIF notices, administrative order, and retention register were supplied simultaneously and therefore; enough time was not allowed to explore these issues. Furthermore, the Hearing Examiner noted testimony from an Agency representative which suggested that a draft version of the retention register could have been provided sooner than it

gain information concerning a proposed RIF, it not unreasonable to expect that an Agency would be required to produce information that is specifically requested, provided that the information is available or obtainable. On this basis, it appears to the Board that in cases such as this one, the duty to provide documents may precede the obligation to engage in impact and effects bargaining.

The Board also adopts the Hearing Examiner's finding and recommendation concerning anti-union animus being a motivating factor in the Agency's reluctance to apply Mr. William Dupree's 4 years of creditable service. Specifically, we believe that this finding is (1) reasonable; (2) supported by the record; (3) and consistent with the Board's precedent.

Because the Hearing Examiner determined that the remaining allegations[16] raised by FOP were not supported by the record evidence and did not violate D.C. Code §1-617.04 (a)(1),(3), (4) and (5), the Board dismisses those allegations, consistent with the Hearing Examiner's Report and Recommendation. (See, R & R at p. 45).

Pursuant to D.C. Code §1-605.02 (3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner's findings and conclusion that DOC committed the specified unfair labor practices described above. In addition, we adopt the Hearing Examiner's finding that the union did not provide support to meet its burden in showing that DOC committed the other unfair labor practices which are not discussed in detail[17].

---

was, even if that version was not a final one.

[16] These allegations are summarized in footnotes 5 and 6 of this Opinion and are described in detail in the Hearing Examiner's Report and Recommendation. (See, R & R at pgs. 21-23).

[17]Also, the Board adopts the Hearing Examiner's finding that it was proper to dismiss PERB Case No. 01-U-21 on Complainant's motion.

ORDER

IT IS HEREBY ORDERED THAT:

1. DOC will cease and desist from refusing to bargain with FOP.

2. DOC will cease and desist from refusing to produce documents upon request.

3. DOC will bargain with FOP on an expedited basis and with retroactive effect over the impact and effect of the previous RIFs, consistent with the Hearing Examiner's Report and Recommendation.

4. Cease and desist from retaliating against FOP's former Chairman, Mr. Dupree, for engaging in protected activity.

5. The allegations which were not found to be supported in the Hearing Examiner's Report and Recommendation are dismissed.

6. PERB Case No. 01-U-21 is dismissed.

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.

August 13, 2003

ORDER

IT IS HEREBY ORDERED THAT:

1. DOC will cease and desist from refusing to bargain with FOP.

2. DOC will cease and desist from refusing to produce documents upon request.

3. DOC will bargain with FOP on an expedited basis and with retroactive effect over the impact and effect of the previous RIFs, consistent with the Hearing Examiner's Report and Recommendation.

4. Cease and desist from retaliating against FOP's former Chairman, Mr. Dupree, for engaging in protected activity.

5. The allegations which were not found to be supported in the Hearing Examiner's Report and Recommendation are dismissed.

6. PERB Case No. 01-U-21 is dismissed.

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.

August 13, 2003

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32 was transmitted via Fax and/or U.S. Mail to the following parties on this 13th day of August 2003.

Joseph R. Reyna, Esq.
Labor Relations Specialist
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

FAX & U.S. MAIL

James F. Wallington, Esq.
Baptiste & Wilder, P.C.
1150 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

FAX & U.S. MAIL

Courtesy Copies

Mary Leary, Director
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL

Walter Wojcik, Esq.
Supervisor Labor Relations Specialist
Office of Labor Relations
and Collective Bargaining
441 4th Street, N.W.
Suite 820 North
Washington, D.C. 20001

U.S. MAIL

Odie Washington, Director
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

U.S. MAIL

Joan Murphy, HR Coordinator
D.C. Department of Corrections
1923 Vermont Avenue, N.W.
Washington, D.C. 20001

U.S. MAIL

Pamela Chase, Chairperson
FOP/DOC Labor Committee
711 -14th Street, N.W.
Washington, D.C. 20001

U.S. MAIL

Sheryl V. Harrington

Sheryl Harrington
Secretary

PERB Public Employee Relations Board

Government of the District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 722, PERB CASE NOS. 01-U-21, 01-U-28 & 01-U-32 (August 13, 2003).

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

WE WILL cease and desist from refusing to bargain in good faith with the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) concerning reductions in force related to the closure of the Lorton Complex by the conduct set forth in Slip Opinion No. 722.

WE WILL cease and desist from refusing to produce documents, upon request, where those documents are relevant and necessary for the exclusive bargaining agent's representational functions.

WE WILL cease and desist from retaliating against Mr. William Dupree, FOP's former Chairman, and any other DOC employees represented by FOP, for engaging in protected activities.

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

District of Columbia Department of Corrections

Date:_____ By_____
Director

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

If employees have an questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150; Washington, D.C., 20005. Phone: (202) 727-1822.

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

August 13, 2003