



On June 30, 2009, Complainant filed a document styled "Union's Amendment to the Unfair Labor Practice Complaint" ("Amended Complaint"), in which it added a new violation. (Amended Complaint at 1-2). Respondents filed an Answer to the Amended Complaint ("Amended Answer"), in which they maintained their previous position that the performance evaluation system is non-negotiable. (Amended Answer at 2).

The issue before the Board is whether the Respondents' refusal to bargain over the implementation of the performance evaluation system violates sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act.

## II. Discussion

### A. Background

The parties agree that on October 17, 2008, Complainant sent an e-mail to Veronica Rock, at the Office of Personnel Evaluation, and Natasha Campbell, at the Office of Labor Relations and Collective Bargaining ("OLRCB"), requesting bargaining over the implementation of a new performance evaluation system. (Complaint at 4; Answer at 3). On October 29, 2008, Complainant's representatives met with Ms. Campbell and again requested to bargain over the implementation of the performance evaluation system. (Complaint at 4). Ms. Campbell stated that she would not bargain over the performance evaluation system. (Complaint at 5). Respondents agree that Ms. Campbell refused to bargain over the implementation of the performance evaluation system, but deny that it was an attempt to restrain, interfere, or coerce Complainant in the exercise of its rights under D.C. Code § 1-617.04(a). (Answer at 3). Further, Respondents deny that OLRCB has "the authority to negotiate and execute collective bargaining agreements with labor organizations concerning wages and other terms and conditions of employment." (Answer at 2-3).

Complainant further alleges that on May 4, 2009, OLRCB declared the implementation of the performance evaluation system to be non-negotiable, without considering Complainant's proposals. (Amended Complaint at 1). Respondents contend that the performance evaluation system is non-negotiable under D.C. Code § 1-613.53(b).

### B. Respondents must engage in impact and effects bargaining

It is well-settled Board precedent that when a union requests impact and effects bargaining, an agency is required to bargain before implementing the change. *See, e.g., FOP/MPDLC v. MPD*, 47 D.C. Reg. 1449, Slip Op. NO. 607, PERB Case No. 99-U-44 (2000); *DC Nurses Association v. Dep't of Mental Health*, Slip Op. No. 1259, PERB Case No. 12-U-14 (April 25, 2012). Further, the Board has held that "although the implementation of a performance evaluation system is a non-negotiable subject of collective bargaining, an agency is obligated to bargain in good faith over the adverse impact a performance evaluation may have on the terms and conditions" of an employee's employment." *American Federation of Government Employees, Local 2725 v. DC Dep't of Consumer and Regulatory Affairs*, Slip Op. No. 930, PERB Case No. 06-U-43 (Feb. 19, 2008).

In the instant case, the Union requested to bargain over the implementation of the performance evaluation system. (Complaint at 5; Amended Complaint Ex. 1). The Respondents, through OLRCB, declared the issue non-negotiable, and refused to bargain. (Answer at 8; Amended Answer at 2). According to Board precedent, Respondents were required to bargain over the impact and effects of the implementation of the performance evaluation system, notwithstanding its designation as a non-negotiable subject of collective bargaining. *AFGE Local 2725*, Slip Op. No. 930. Therefore, Respondents' refusal to bargain constitutes an unfair labor practice under D.C. Code §§ 617.04(a)(1) and (5).

### C. Remedies

Complainant seeks the following remedies:

- (1) "an order to the Respondents to cease and desist attempting to discriminate, interfere and coerce the Complainant and its bargaining unit members";
- (2) "an award that instructs the Respondents to negotiate with the Complainant over the new performance rating system and to resume using the system in effect prior to implementing the new performance rating system";
- (3) "an order that the Complainant and its members be made whole for any [lost] wages or benefits denied as a result of this violation, including removing the new performance ratings from employees' official and unofficial records. We seek an order that the Complainant and its members be made whole for any other loss suffered as a result of the Respondents' refusal to bargain";
- (4) "an order that the Respondents pay the Complainant for all cost[s] related to processing and presenting this ULP, including parking and travel expenses, use of leave and clerical expenses, i.e., copies, typing, etc.";
- (5) reasonable attorney fees;
- (6) "an order from the Board instructing the Respondents to post a notice about the alleged violations cited in this complaint"; and
- (7) "any other remedy that the Public Employee Relations Board deems appropriate."

(Complaint at 5-6).

The Board will order Respondents to cease and desist violating D.C. Code §§ 1-617.04(a)(1) and (5), and Respondents will post a notice.

The new performance rating system is already in effect, and the Board will not instruct Respondents to resume using the previous system. The Board has held that *status quo ante* relief

is generally inappropriate to remedy a refusal to bargain over impact and effects. *AFSCME Local 383 v. D.C. Dep't of Mental Health*, 52 D.C. Reg. 2527, Slip Op. No. 753 at p. 7, PERB Case No. 02-U-16 (2004) (citing *FOP/MPDLC v. MPD*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000)). Furthermore, *status quo ante* relief is not appropriate when: (1) the rescission of the management decision would disrupt or impair the Agency's operation; and (2) there is no evidence that the results of such bargaining would negate a management decision. *Id.* In the instant case, rescinding the performance evaluation system after three years would disrupt the Respondents' operations. Additionally, because the performance evaluation system is statutorily non-negotiable, bargaining cannot negate the Respondents' decision. As the departure from the status quo was a management right, and *status quo ante* relief is inappropriate, the Respondents will not be ordered to rescind the performance evaluation system or compensate bargaining unit members for losses resulting from its implementation.

D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000):

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

In the instant case, Complainant was successful in its case, and an award of reasonable costs is in the interest of justice.

The Board is not authorized to grant attorneys' fees, so none will be awarded in this case. *American Federation of Government Employees, Local 631 v. District of Columbia Department of Public Works*, Slip Op. No. 1001 at p. 12, PERB Case No. 05-U-43 (Dec. 31, 2009); *see also*

*American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, Slip Op. No. 1003 at p. 6 n. 6, PERB Case No. 09-U-65 (Dec. 30, 2009) (“The Board has made it clear that attorney fees are not a cost.”).

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. Complainant AFGE Local 631’s Unfair Labor Practice Complaint is granted.
2. Respondents will cease and desist violating D.C. Code §§ 1-617.04(a)(1) and (5) by refusing to bargain in good faith with the Complainant over the impact and effects of the implementation of the performance evaluation system.
3. Respondents shall engage in impact and effects bargaining over the implementation of the performance evaluation system within 10 (ten) days from the Complainant’s request to bargain.
4. Respondents shall pay reasonable costs to the Complainant.
5. Respondents shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to bargaining unit members are normally posted. The Notice shall remain posted for thirty (30) consecutive days;
6. Respondents shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly;
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.

October 19, 2012

**CERTIFICATE OF SERVICE**

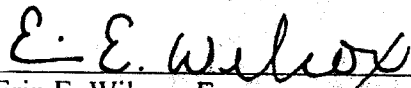
This is to certify that the attached Decision and Order in PERB Case No. 09-U-18 was transmitted to the following parties on this the 19<sup>th</sup> day of October, 2012.

Ms. Barbara Hutchinson, Esq.  
7907 Powhatan St.  
New Carrollton, MD 20784  
bbhattync@gmail.com

**U.S. MAIL and E-MAIL**

Mr. Dennis Jackson, Esq.  
Mr. Jonathan O'Neill, Esq.  
MS. Natasha Campbell, Esq.  
441 4<sup>th</sup> St. NW  
Suite 820 North  
Washington, D.C. 20001  
dennis.jackson@dc.gov

**U.S. MAIL and E-MAIL**



Erin E. Wilcox, Esq.  
Attorney-Advisor