GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees Local Union No. 383, AFL-CIO, Complainant,	PERB Case No. 94-U-09 Opinion No. 418
v.	
District of Columbia Department of Human Services, Respondent.	

DECISION AND ORDER

On January 26, 1993, American Federation of Government Employees, Local 383, AFL-CIO (AFGE) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board). AFGE charged that the Respondent District of Columbia Department of Human Services (DHS) had violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (5) by failing to bargain in good faith with AFGE as the exclusive representative of bargaining unit employees concerning: (1) the impact and effects of a reduction-in-force on the terms and conditions of employment of the employees that were RIF'd and those that were retained; and (2) the terms and conditions for rehiring RIF'd bargaining unit employees. [1]/ By Answer filed on February 18, 1994, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DHS, denied that unfair labor practices had been committed by the acts and conduct alleged.

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[1]/ AFGE was certified as the representative of the instant unit of employees in BLR Case No. 9R010. The bargaining unit employees affected by the RIF involved employees holding the position of youth correctional officer. A total of 53 employees were RIF'd as a result of the closure of DHS's Cedar Knoll facility pursuant to measures taken to address the District's severe budgetary constraints.

The matter was heard on September 16 and 29, 1994, and the Hearing Examiner issued his Report and Recommendation on December 15, 1994 (a copy of which may be reviewed or obtained at the office of the Board). Neither party filed exceptions to the Report and Recommendation. The case is now before the Board to adopt, in whole or in part, or state reasons for rejecting the conclusions of the Hearing Examiner and issue a Decision and Order to this effect.

The Hearing Examiner made the following findings and conclusions:

By letter dated February 8, 1993, DHS notified AFGE that due to budgetary constraints and the closure of one of its facilities, there likely would be a reduction-in-force (RIF) of bargaining unit employees later in the year. (R&R at 8.) DHS "affirmed" its willingness to engage in impact and effects bargaining over the RIFs. AFGE and DHS representatives engaged in a number of meetings during the summer and fall of 1993, concerning the closure of the DHS facility and the RIFs. (R&R at 8.)

On October 27, 1993, approximately 53 bargaining unit employees, holding positions as youth correctional officers, were provided notice that they would be RIF'd effective December 3, 1993. Under District Personnel Manual (DPM) Regulations, these employees were classified as Tenure Group III. As such, they possessed no right to bump and retreat, or receive priority consideration for hire into vacant jobs, reemployment or reassignment.

During the remaining weeks prior to the December 3rd RIFs, AFGE met with DHS officials in an attempt to persuade DHS to rescind the scheduled RIFs. The Hearing Examiner found that both DHS and AFGE officials were aware that the December 3, 1993 RIF would result in a situation that would violate the minimum court mandated staffing requirements. As a result, DHS would either have to operate in violation of the court's consent decree, rescind the RIF, hire new YCOs or a combination of these options. (R&R at 9, 17 and 18.)
Nevertheless, DHS rejected all requests by AFGE to rescind the RIF and pursued alternative means for meeting projected staffing needs at certain facilities required under a consent decree.

AFGE did not request bargaining or present proposals on the impact and effect of the RIFs, either on employees that would be separated or those that would remain. It steadfastly adhered to the position that the RIFs should simply be cancelled.

During the week prior to the scheduled RIF, DHS officials concluded that it could not meet court mandated staffing requirements. DHS then decided to hire 39 temporary employees (NTE 90 days) to meet its staffing needs, including the rehiring of many of the bargaining unit employees that would be RIF'd on December 3, 1993. A further decision was made to rehire these employees on December 6, 1993, to ensure a break in service under DPM regulations. DHS did not advise AFGE nor did AFGE become aware of these decisions prior to the rehiring of these employees on December 6, 1993.

On December 3, 1993, the RIF was implemented. On December 6, 1993, DHS rehired 39 of the RIF'd YCOs as new temporary employees. The Hearing Examiner concluded that these RIF'd employees were rehired into positions that were included in the bargaining unit.

During the week after these employees were rehired as new temporaries, DHS required them, as a condition of maintaining their reemployment, to execute a memorandum of understanding (MOU) confirming their temporary employment status. Later, in January 1994, many of the rehired employees had their status converted to 13-month term appointments. All this was done without notice or bargaining with AFGE.

The Hearing Examiner concluded that AFGE did not engage in impact and effects bargaining or present any proposals before the December 3, 1993 RIF because AFGE believed "that the announced December 3, 1993 RIF could not proceed as planned" due to the understaffing that would result under the consent decree. (R&R at 9.) The Hearing Examiner found that "[AFGE] did not make any proposals after December 3, 1993, regarding the rehire of YCOs because DHS had completed its rehiring and there would have been no point in attempting to bargain after the fact on such action". (R&R at 9.) [2]/

Based on these findings, the Hearing Examiner concluded that DHS was required to engage in effects bargaining concerning the December 3, 1993 RIF, but was not obligated to bargain over the RIF decision itself. (R&R at 16.) The Hearing Examiner ruled that DHS' inability to decide until the day of the RIF that it would rehire employees had subverted AFGE's right to bargain over

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[2]/ The Hearing Examiner made note of AFGE's assertion that it would have submitted proposals on DHS' decision to immediately rehire RIF'd employees had DHS notified AFGE of this decision in advance of the rehire. The Examiner also noted DHS' proffer that it would have bargained with AFGE over any impact and effects proposal submitted, including the rehiring of RIF'd employees.

the effects of that decision on the RIF'd employees. (R&R at 17.) He further concluded that AFGE's failure to submit a proposal after December 3, 1993, did not waive AFGE's right to engage in such effects bargaining. (R&R at 20.) Finally, the Hearing Examiner concluded that DHS committed an unfair labor practice by requiring rehired employees to execute a MOU documenting their status as temporary employees, and by later converting these employees to term employees, without bargaining with AFGE. (R&R at 21.) By these acts and conduct, the Hearing Examiner found that DHS violated D.C. Code § 1-618.4(a)(5) and (1).

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and the entire record. The Board hereby adopts the Hearing Examiner's findings of fact. With respect to the conclusions of law, the Board rejects the Hearing Examiner's conclusions that DHS has violated D.C. Code § 1-618.4(a)(5) and (1) for the reasons discussed below.

The violations found by the Hearing Examiner stem from DHS' implementation of its decision to rehire RIF'd bargaining unit employees as temporary employees without first providing AFGE with notice and an opportunity to bargain. The Board has held that management's rights under D.C. Code § 1-618.8(a) do not relieve it of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning, the implementation of these management right decisions. IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). The effects and impact of a non-bargainable management decision upon terms and conditions of employment, however, are bargainable only upon request. Teamsters, Local 639 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). The Board has further held that, absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-618.4(a)(5) and (1) by unilaterally implementing a management right under D.C. Code § 1-618.8(a), without notice or bargaining. UDCFA/NEA v. UDC, ___ DCR _____, Slip Op. No. 387, PERB Case No. 93-U-22 and 93-U-23 (1994).[3]/

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[3]/ In contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required to establish a failure to bargain in good faith. Under such circumstances management's duty to bargain attaches to the matter implemented or changed and management's unilateral action precludes any opportunity to make a request or bargain prior to

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The Hearing Examiner concluded that each of DHS' actions, i.e., the RIF of bargaining unit employees and the rehiring of former employees, gave rise to an obligation to bargain.[4]/ With respect to the rehire, the Hearing Examiner further concluded that DHS did not bargain in good faith when it implemented its decision to hire RIF'd employees without providing AFGE with notice or an opportunity "to negotiate concerning not only the hire of RIF'd YCOs into these new positions, but also concerning the method for choosing which YCOs would be given first opportunity to perform the limited YCO temporary work which became available after December 3, 1993[, i.e., the date of the RIF]." (R&R at 19.)

The right to hire or rehire employees is a sole management right. D.C. Code § 1-618.8(a)(2). Management does not commit a violation of its duty to bargain in good faith by not bargaining over the exercise of that right or any impact and effects of exercising that right when no request to bargain concerning the impact and effects is made. UDCFA/ NEA v. UDC, ___ DCR _____, Slip Op. No. 387, PERB Case No. 93-U-22 and 93-U-23 (1994). This is the case notwithstanding the absence of notice or opportunity to bargain prior to exercising the management right. Id. Therefore, contrary to the Hearing Examiner's conclusion, DHS cannot be found to have violated any obligation to bargain concerning the impact and effects of rehiring RIF'd employees since he specifically found that AFGE never made a request to bargain. [5]/

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[3](...continued)
implementation or change. AFGE, Local Union No. 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992).

[4]/ Yet the Hearing Examiner concluded that "the effects of the RIF include[s], but [is] not limited to, the possibility of reemployment of the RIF'd YCOs." (R&R at 16.) Notwithstanding this conflicting conclusion, we find the record clearly supports that DHS afforded AFGE a full opportunity to bargain over the impact and effects of the RIF. AFGE was provided notice of the RIF and extended an opportunity to bargain over any impact or effect over a period of approximately 10 months, i.e., from February 8 to December 3, 1993.

[5]/ We cannot speculate, as did the Hearing Examiner, over the futility of a request by AFGE to bargain over the rehiring of these RIF'd YCOs to determine the existence of a statutory violation. Our ruling is limited to the facts of this case. We
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We now turn to the remaining violations found by the Hearing Examiner following the rehiring of these employees as temporary employees (NTE 90 days). We have held that employees that do not have a reasonable expectation of continued employment lack the necessary interest in their terms and conditions of employment to share a community of interest with regular employees in a bargaining unit. American Federation of State, County and Municipal Employees, Council 20 and D.C. Public Schools, 31 DCR 2287, 2288, Slip Op. No. 70 at 2, PERB Case No. 83-R-08 (1984).

No finding was made by the Hearing Examiner as to these employees' prospects for long-term employment at the time these violations were found to have occurred. The Hearing Examiner merely assumed that these former bargaining unit employees once again became a part of the bargaining unit when they were rehired, an issue that DHS did not challenge. (R&R at 7.) Even assuming, however, that these employees' prospects for continued employment qualified them as members of the bargaining unit, we find that the MOU that these employees were required to sign did not effect any change in these employees' terms and conditions of employment to evoke DHS' obligation to bargain over it. The MOU was thereby a device used by management to inform employees of their new status. Therefore, we must reject the Hearing Examiner's finding of a violation by DHS' failure to bargain with AFGE over these employees' execution of an MOU that merely documented their temporary employment status. [6]/

We also find no violation by DHS' conversion of some of the new temporary employees to term employees without providing AFGE notice and an opportunity to bargain since the Examiner found that AFGE made no request to bargain. DHS' action was the exercise of a management right, i.e., "[t]o determine ... the number, types and grades of positions assigned to an

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[5](...continued)
do not reach the issue of determining an exclusive representative's right to bargain over procedures and the impact and effect of rehiring former bargaining unit employees when those employees are separated from their employment or are subject to employment rights that are governed by law since no request to bargain was ever made.

[6]/ After the rehires, there was general confusion among these employees concerning their employment status. The Report and Recommendation is unclear as to whether or not these employees' execution of a memorandum of understanding documenting their temporary status was done pursuant to AFGE's request that DHS "clearly notify employees who had been rehired that their rehires were only to temporary appointments". (R&R at 8.)

organizational unit... ." D.C. Code § 1-618.8(a)(5). As such, any obligation to bargain extended only to any impact and effects of exercising that right, and only upon request.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

March 29, 1995

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order in PERB Case No. 94-U-09 was sent via facsimile transmission and/or mailed (U.S. Mail) to the following parties on this 29th day of March, 1995:

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