Government of the District of Columbia
Public Employee Relations Board

In the Matter of	
Fraternal Order of Police/ Protective Services Division Labor Committee	
Petitioner	PERB Case No. 18-U-01
v.	Opinion No. 1739
District of Columbia Department of General Services	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On October 9, 2017, the Fraternal Order of Police/Protective Services Division Labor Committee (FOP) filed an Unfair Labor Practice Complaint (Complaint) against the Department of General Services (DGS). FOP alleged violations of D.C. Official Code § 1-617.04(a)(1) and (5), asserting DGS unilaterally implemented a change in a parking policy of providing free worksite parking. FOP claimed that the parking policy was a mandatory subject of bargaining and that DGS failed to bargain in good faith.[1] Among other remedies, FOP requested attorney fees and back pay.

On November 22, 2017, DGS filed an Answer to the Complaint. DGS raised the affirmative defense that it did not have a past practice of free worksite parking and requested dismissal of the Complaint.[2] DGS also asserted that the bargaining unit employees' compensation agreement covered parking and that the Board did not have jurisdiction over the Complaint.

On April 29, 2019, the Hearing Examiner issued his Report and Recommendation (Report). The Hearing Examiner found that DGS committed an unfair labor practice by unilaterally

[1] Compl. at 2.
[2] Answer at 3.

implementing a change in the parking policy and failing to negotiate with FOP upon request.[3] DGS filed Exceptions, arguing that the Hearing Examiner's Report and Recommendation is contrary to law, unreasonable, and inconsistent with PERB precedent.[4] FOP filed an Opposition to DGS's Exceptions.[5]

The Board adopts the Hearing Examiner's Report and Recommendation finding that DGS violated D.C. Official Code § 1-617.04(a)(1) and (5).

For the reasons stated herein, the Board finds that an award of attorney fees is an available remedy within the Board's jurisdiction in accordance with the Federal Back Pay Act (Back Pay Act)[6] and the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (CMPA).[7] Therefore, the Board overturns its prior precedents and remands the attorney fees issues to the Hearing Examiner for further consideration.[8]

II. Hearing Examiner's Report and Recommendation

A. Background

FOP represents approximately sixty-five (65) protective service officers who serve as the police force for DGS in the Protective Services Division. The officers are responsible for law enforcement and the physical security of government property.[9]

The Protective Services Division was previously headquartered at 1900 Massachusetts Avenue SE. At that location, bargaining unit employees parked for free at the former D.C. General Hospital's campus.[10] Parking was open to the public on a first-come, first-serve basis. Bargaining unit employees parked in a fenced-in area within the larger public lot.[11] Although the parking area was fenced-in, DGS did not pay for parking.[12]

At some point, the Protective Services Division began the process of relocating its headquarters from 1900 Massachusetts Avenue to its current location at 64 New York Avenue NE.[13] DGS was aware that the relocation of the headquarters would lead to a change in the parking conditions for bargaining unit employees.[14]

Prior to the move, DGS addressed the changes anticipated by the relocation with Protective Services Division employees. On April 7, 2014, a DGS management official sent an email to the

---

[3] Report at 25.
[4] Resp't Exceptions to Report filed May 24, 2019.
[5] Opp'n to Exceptions to Report filed June 7, 2019.
[6] 5 U.S.C.A. § 5596.
[7] D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2016 Repl.)
[8] *E.g.*, *UDCFA/NEA v. UDC*, Slip Op. No. 272 at 5, PERB Case No. 90-U-10 (1991) (holding that the Board is not authorized to award attorney fees).
[9] Report at 5.
[10] Report at 5.
[11] Report at 5. The Hearing Examiner found no evidence of who constructed the fence marking the boundaries of the Protective Services Division employee parking.
[12] Report at 5.
[13] Report at 5.
[14] Report at 5.

Protective Services Division employees stating that "the Director of DGS had confirmed [that the Protective Services Division] should have subsidized parking based on its mission for the city."[15]

By October 2014, the Office of Labor Relations and Collective Bargaining (OLRCB) and FOP counsel discussed the Protective Services Division relocation and free worksite parking.[16] The parties agreed to a pilot parking program that provided 20-25 parking spaces for bargaining unit employees to use over the course of three shifts.[17] Following the relocation, DGS issued parking passes to bargaining unit employees that allowed free parking at 64 New York Avenue.[18]

In or around May 2017, construction began at the 64 New York Avenue parking lot to convert it into a multi-level garage.[19] After construction began, DGS reviewed the parking privileges of bargaining unit employees.[20] On September 29, 2017, DGS canceled the bargaining unit employees' parking passes and subsequently required bargaining unit employees to pay for parking.[21] Bargaining unit employees had free parking from October 2014 to October 2017.[22]

B. Hearing Examiner's Recommendations

The Hearing Examiner determined that employee parking was a mandatory subject of bargaining and that the parties' collective bargaining agreement was silent on the topic.[23] The Hearing Examiner found that the parties established a past practice of free worksite parking that was known, accepted by, and readily ascertainable.[24] The Hearing Examiner concluded that the provision of free parking for three years constituted a binding past practice and an implied term and condition of employment.[25]

The Hearing Examiner found that DGS recognized its obligation to provide free worksite parking, reached an agreement on a pilot parking program, and issued parking passes to all bargaining unit employees.[26] The Hearing Examiner determined that DGS refused to bargain upon FOP's demand after the cancelation of free worksite parking.[27] The Hearing Examiner rejected two defenses proffered by DGS: (1) DGS managers were unauthorized to approve the free worksite parking, and (2) the District cannot pay for commuter parking.[28] Thus, the Hearing Examiner found DGS violated D.C. Official Code § 1- 617.04(a)(1) and (5).[29]

---

[15] Report at 5.
[16] Report at 6.
[17] Report at 7.
[18] Report at 7.
[19] Report at 7.
[20] Report at 7.
[21] Report at 7-8.
[22] Report at 19.
[23] Report at 17.
[24] Report at 19.
[25] Report at 19.
[26] Report at 19.
[27] Report at 20.
[28] Report at 20-21.
[29] Report at 20.

III. Discussion

Under Board Rule 520.11, "[t]he party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."[30] The Board will adopt a Hearing Examiner's Report and Recommendation if it is reasonable, supported by the record, and consistent with Board precedent.[31]

A. DGS's Exceptions

DGS filed Exceptions, contesting the Hearing Examiner's finding that DGS committed an unfair labor practice. DGS challenges the Hearing Examiner's (1) admission of witness testimony into evidence, (2) application of appropriations law, and (3) determination that free worksite parking was a past practice and mandatory subject of bargaining.

1. Witness Testimony

In the Report, the Hearing Examiner addressed DGS's objection at the hearing, which was renewed in DGS's post-hearing brief.[32] DGS objected to the participation of FOP's prior counsel in the hearing as a fact witness.[33]

The hearing was scheduled for January 9, 2019. On January 7, 2019, FOP entered a notice of appearance for new counsel into the record.[34] On January 8, 2019, DGS received an amended witness list naming FOP's prior counsel as a witness.[35] DGS objected on the grounds that testimony from FOP's prior counsel would violate Rule 3.7 of the D.C. Rules of Professional Conduct.[36] FOP's prior counsel also withdrew from the case at the hearing and was sequestered as

---

[30] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018). *See Council of Sch. Officers, Local 4 v. DCPS*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010).

[31] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 6, PERB Case No. 15-U-28 (2018). *See AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

[32] Report at 3.

[33] Report at 3.

[34] Report at 3.

[35] Report at 3.

[36] Rules of Professional Conduct: Rule 3.7--Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
(1) The testimony relates to an uncontested issue;
(2) The testimony relates to the nature and value of legal services rendered in the case; or
(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9. The provisions of this paragraph (b) do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency (District of Columbia Bar 2007).

a witness before the new FOP counsel began its case-in-chief.[37] The Hearing Examiner overruled DGS's objection and permitted the testimony of FOP's prior counsel.[38]

In its Exceptions, DGS argues that the testimony of FOP's prior counsel was accepted uncritically[39] and should have been prevented by Rule 3.7 of the D.C. Rules of Professional Conduct.[40] FOP opposes DGS's Exception, arguing that DGS's argument is nothing more than a disagreement with the Hearing Examiner and provides no basis for the reversal of the Hearing Examiner's factual findings.[41]

The Board finds the Hearing Examiner's ruling on DGS's objection was reasonable. Hearing Examiners have broad powers in determining the admissibility of evidence.[42] Rule 3.7 of the D.C. Rules of Professional Conduct prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Rule 3.7 is primarily concerned with instances where trial counsel takes the stand.[43] The prohibitions found in Rule 3.7 prevent conflicts that arise when an attorney places their own credibility at issue in litigation.[44] Such combined roles may prejudice the client when the attorney testimony is impeached on cross-examination, or may prejudice the opposing party, when the attorney testimony is given undue weight by the fact-finder because of the dual role.[45]

Here, FOP's prior counsel, whose name had been added to the witness list on January 8, withdrew on the record at the beginning of the hearing, and was thereafter sequestered as a witness before the opening of the case-in-chief.[46] The potential prejudice to the opposing party was avoided because FOP's prior counsel did not appear in dual roles. FOP's prior counsel did not act as trial counsel; therefore, she was not prohibited by the D.C. Rules of Professional Conduct from providing testimony as a witness. The Hearing Examiner's decision to permit the testimony of FOP's prior counsel was reasonable and supported by the record.[47]

---

[37] Report at 3.
[38] Report at 3.
[39] Resp't Exceptions at 19. The Board will not evaluate the probative weight given to FOP's prior counsel's testimony because the Board does not find a violation of Rule 3.7 of the D.C. Professional Rules of Conduct. Such determinations are reserved for the Hearing Examiner. *See WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018).
[40] Resp't Exceptions at 18.
[41] Opp'n to Exceptions at 7.
[42] *See* PERB Rule 550.13(f), "Hearing Examiners shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. Hearing Examiners shall have all powers necessary to that end including, but not limited to, the power to: (f) Call and examine witnesses and introduce or exclude documentary or other evidence." *See also,* PERB Rule 550.16, "In hearings before Hearing Examiners, strict compliance with the rules of evidence applied by the courts shall not be required. The Hearing Examiner shall admit and consider proffered evidence that possesses probative value. Evidence that is cumulative or repetitious may be excluded."
[43] *Coleman v. United States*, 948 A.2d 534, 546 (D.C. 2008).
[44] *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. 1991).
[45] *Id.*
[46] Tr. at 10-13.
[47] *FOP/MPD Labor Comm. ex rel. Daniels v. MPD*, 62 D.C. Reg. 5878, Slip Op. No. 1510 at 7, PERB Case No. 08-U-26(a) (2015) (holding that credibility resolutions are reserved for the hearing examiner and challenging a hearing

2. Law and Policy of Appropriations and Collective Bargaining

In the Report, the Hearing Examiner considered DGS's argument that it relied upon a November 2018 memorandum issued by the D.C. Office of Attorney General to support its cancelation of free worksite parking.[48] DGS acknowledged that the November 2018 memorandum did not prohibit expenditures on worksite parking, but provided a narrow "necessary expense" exception to the rule that agencies may not provide free worksite parking.[49] Nevertheless, DGS argued that the "necessary expense" exception did not apply; therefore, DGS was prohibited from paying a third-party vendor for worksite parking.[50] The Hearing Examiner found that DGS failed to provide credible, material evidence for its argument. The Hearing Examiner found that evidence and testimony based on the November 2018 memorandum amounted to a *post hoc* legal opinion that did not specifically prohibit the free worksite parking policy.[51]

In its Exceptions, DGS argues that 31 U.S.C § 1301(a) and 31 U.S.C. § 1341 prohibits the District from making expenditures for personal expenses except when the expenditure is a "necessary expense."[52] A "necessary expense" means that the lack of an expenditure would significantly impair the operating efficiency of the agency, which would be detrimental to the hiring and retention of personnel.[53] DGS argues that it did not apply the "necessary expense" exception to the free worksite parking policy; therefore, it did not have the discretion to pay a third-party vendor for free worksite parking.[54]

The Board finds DGS's Exception unconvincing. An agency may exercise its discretion related to parking accommodations through collective bargaining thereby making the provision of such parking a nondiscretionary agency policy.[55] Here, the Hearing Examiner found that free worksite parking was negotiated and established as a binding past practice between the parties."[56]

The Board has held that issues of fact concerning the probative value of evidence and credibility determinations are reserved for the Hearing Examiner.[57] In this case, the Hearing

---

examiner's findings with competing evidence does not constitute a proper exception if the record contains evidence supporting the hearing examiner's conclusions).

[48]Report at 9.

[49]Report at 9.

[50] Resp't Post-Hearing Br. 22-23.

[51]Report at 21 n.6.

[52] Resp't Exceptions at 12.

[53] 31 U.S.C §1301(a) requires appropriations be applied only to the objects for which the appropriation was made. Additionally, 31 U.S.C. §1341 makes it unlawful for government officials to make an expenditure that exceeds appropriations or to enter into a contract before an appropriation is authorized.

[54] Resp't Exceptions at 15.

[55] *See Fed. Aviation Admin. & Prof'l Air Traffic Controllers Org.- Arbitration Awards of Employee Parking Accommodations*, 55 Comp. Gen. 1197 (June 25, 1976) (upholding arbitration awards to provide commuter parking and finding that the FAA determined that parking accommodations were a necessary expense and exercised its discretion through the collective bargaining agreement, therefore it became a nondiscretionary agency policy to provide parking accommodations).

[56]Report at 19.

[57] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 5, PERB Case No. 15-U-28 (2018). *See Council of Sch. Officers, Local 4 v. DCPS,* 59 D.C. Reg. 6138, Slip Op. No. 1016 at 6, PERB Case No. 09-U-08 (2010).

Examiner concluded that the evidence presented to support the assertion that DGS did not apply the "necessary expense" exception had marginal relevance, lacked materiality and evidentiary weight, and raised no material defense to the ULP charge. [58] The Board finds that DGS waived its discretion through collective bargaining and that the Hearing Examiner's determination was reasonable, supported by the record, and not contrary to law.

3. Past Practice

In the Report, the Hearing Examiner relied on *FOP/MPD Labor Committee v. MPD* [59] and determined that parking is a mandatory subject of bargaining.[60] The Hearing Examiner was unpersuaded by DGS's argument that parking was addressed in the compensation agreement covering the bargaining unit employees.[61] The Hearing Examiner found that the parties' compensation agreement was silent on the issue of free commuter parking, and the parties established a past practice of free worksite parking for commuting.[62]

In its Exceptions, DGS argues that free worksite parking is not a mandatory subject of bargaining.[63] DGS argues that the Hearing Examiner erred in holding that free worksite parking was (1) an established past practice and (2) compensation requiring bargaining under *FOP/MPD Labor Committee v. MPD* and *AFGE Local 383 v. D.C. MRDDA*.[64]

Generally, a unilateral change in employees' existing terms and conditions of employment is a violation of the CMPA.[65] Notwithstanding, the Board has held that "the duty to bargain over a unilateral change in a past practice is limited by statutory rights."[66] DGS challenges the existence of a past practice and the determination that free worksite parking is compensation within the scope of bargaining, and therefore, DGS asserts that it did not have a duty to bargain with FOP. For the following reasons, DGS's arguments fail.

DGS's argument that the Hearing Examiner erred in finding a past practice is unpersuasive. A condition of employment becomes a past practice when it is readily ascertainable over a reasonable period of time and goes unchallenged by the parties.[67] In the absence of a documented

---

[58] Report at 21.
[59] *FOP/MPD Labor Committee v. MPD*, 38 D.C. Reg. 847, Slip Op. No. 261, PERB Case No. 90-N-05 (1991).
[60] Report at 17.
[61] A unilateral change in a past practice is an unfair labor practice unless the terms and conditions are specifically covered by the parties' collective bargaining agreement. A change in past practice covered by the contract is subject to the parties' grievance procedure. *See AFGE, Local 2978 v. DOH*, 62 D.C. Reg. 2874, Slip Op. No. 1499 at 1-2, PERB Case No. 14-U-14 (2015).
[62] Report at 19.
[63] Resp't Exceptions at 4.
[64] Resp't Exceptions at 8. *FOP/MPD Labor Committee v. MPD*, 38 D.C. Reg. 847, Slip Op. No. 261, PERB Case No. 90-N-05 (1991) and *AFGE Local 383 v. D.C. MRDDA*, 59 D.C. Reg. 4584, Slip Op. No. 938, PERB Case No. 07-U-03 (2011).
[65] *AFGE, Local 2978 v. DOH*, 62 D.C. Reg. 2874, Slip Op. No. 1499, PERB Case No. 14-U-14 (2015).
[66] *AFSCME District Council 20 and Local 2091 v. DPW*, 62 D.C. 5925, Slip Op. No. 1514 at 2, PERB Case No. 14-U-14 (2015).
[67] *AFGE, Local 383 v. DYRS and OLCRB*, 60 D.C. Reg. 7160, Slip Op. No. 1301 at 4, PERB Case No. 09-U-04 (2013). *See U.S. Dep't of Labor and AFGE, Nat'l Council of Field Labor Locals, Local 1748*, 38 FLRA 899, 908 (Dec. 13, 1990) (holding that past practice must be consistently exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other).

agreement, the customs and practices that the parties have maintained over time are particularly important.[68] Determining whether the parties have established a mutually acceptable past practice is an issue of fact concerning the probative value of the evidence reserved for the Hearing Examiner.[69]

Here, the Hearing Examiner found that months before the relocation to 64 New York Avenue a DGS management official notified bargaining unit employees that the DGS Director confirmed the need for free worksite parking.[70] The Hearing Examiner found that DGS initiated negotiations with FOP to address free worksite parking and the parties agreed to a pilot program of 20-25 parking spaces for bargaining unit employees.[71] The Hearing Examiner determined that the pilot program was an extension of the free worksite parking at 1900 Massachusetts Avenue. The Hearing Examiner found that soon after the pilot program was negotiated, DGS management officials issued parking passes to all FOP bargaining unit employees. The Hearing Examiner held that free worksite parking moved from a pilot program to a formal practice and continued from October 2014 until October 2017. In this instance, the Hearing Examiner's finding that the parties established free worksite parking as a binding past practice was reasonable and supported by the record.

Furthermore, the Board has held that parking is a mandatory subject of bargaining.[72] The Board resolves issues involving the scope of bargaining on a case-by-case basis by using three categories of collective bargaining. The three categories are (1) mandatory subjects over which the parties must bargain, (2) permissive subjects over which the parties may bargain, and (3) illegal subjects over which the parties may not legally bargain.[73]

The Board's precedent is clear that employer-provided parking is part of employees' wages and constitutes a bargainable term and condition of employment under the CMPA.[74] Failure to bargain before implementing a unilateral change in mandatory subjects of bargaining such as wages, hours, and working conditions is an unfair labor practice.[75] In the present case, DGS does

---

[68] *Id. Accord, United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581–82 (1960)("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.").
[69] *FOP/DOC Labor Comm. v. DOC*, 49 D.C. Reg. 8937, Slip Op. No. 679 n. 20, PERB Case No. 00-U-36 and 00-U-40 (2002).
[70] Report 18.
[71] Report 18.
[72] *See FOP/MPD Labor Committee v. MPD*, Slip Op. No. 261, (1991); *AFGE Local 383 v. D.C. MRDDA*, Slip Op. No. 938 (2011).
[73] *AFGE, Local 3721 v. FEMS*, 65 D.C. Reg.7650, Slip Op. No. 1658, PERB Case No. 17-N-03 (2018).
[74] *AFGE Local 383 v. D.C. MRDDA*, 59 D.C. Reg. 4584, Slip Op. No. 938 at 5 (2011) (citing *FOP/MPD Labor Committee v. MPD*, Slip Op. No. 261 at n. 3 (1991)).
[75] *AFGE, Local 631 v. DPW*, 59 D.C. Reg. 5981, Slip Op. No. 1001 at 4, PERB case No. 05-U-43 (2012) (upholding a hearing examiner's report that found that "unilaterally changing a mandatory subject of bargaining such as wages, hours, or working conditions before reaching impasse in bargaining over those matters (unless you have waived this right in the contract), is an unfair labor practice").

not cite any legal authority to contradict the Board's precedent that parking is compensation. Consequently, DGS's request to reverse the Board's precedent is without merit.[76]

The duty to bargain requires an employer to provide the bargaining representative with notice and an opportunity to bargain before unilaterally changing an established past practice affecting a mandatory subject of bargaining.[77] "A pervasive unilateral change occurs when an employer changes a past practice which affects a term and condition of employment without giving the Union an opportunity to bargain over the issue."[78] The Hearing Examiner's finding that DGS unilaterally changed a past practice and refused to bargain was reasonable and supported by the record. Therefore, the Board finds that DGS implemented a pervasive unilateral change, thereby committing an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (5).

IV. Attorney Fees

FOP requested attorney fees in accordance with the Back Pay Act.[79] The issue of whether the Board has authority to order attorney fees pursuant to the Back Pay Act is now before the Board.

D.C. Official Code § 1-617.13 authorizes the Board to provide remedies for employees who have "suffered adverse economic effects" as a result of an unfair labor practice.[80] Relevant here, the Board is authorized to award back pay, costs, and make whole remedies.[81]

A. Prior Board Precedent

In *UDCFA/NEA v. UDC*,[82] the Board held that the CMPA does not provide the Board with authority to award attorney fees.[83]

For nearly thirty years, the Board has relied on *UDCFA/NEA v. UDC* to limit the available relief for parties in unfair labor practice cases. *UDCFA/NEA v. UDC* was decided by the Board on May 9, 1991. Later that year, on November 6, 1991, the D.C. Court of Appeals decided *Zenian v. OEA.*[84] As explained below, the Board's position in *UDCFA/NEA v. UDC* is inconsistent with the *Zenian* decision. Here, upon scrutiny of the Board's prior holdings and analysis of decisions from the D.C. Court of Appeals, the Board overturns its previous rulings and finds that it has jurisdiction

---

[76] *See AFGE, Local 383 v. MRDDA*, Slip Op. No. 938 at 5 (2011) (holding that a request to reverse the Board's prior decisions is without merit when the request lacks citation to legal authority, and when the precedent has not been reversed by the Board, Superior Court of the District of Columbia, or District of Columbia Court of Appeals).
[77] *AFGE Local 383 v. D.C. MRDDA*, Slip Op. No. 938 at 8 (2011).
[78] *FOP/DOC Labor Comm. v. DOC*, 49 D.C. Reg. 8937, Slip Op. No. 679 at 5, PERB Case No. 00-U-36 and 00-U-40 (2002).
[79] Report 24.
[80] D.C. Official Code §1-617.13(a).
[81] D.C. Official Code §1-617.13(a), (d).
[82] *UDCFA/NEA v. UDC*, Slip Op. No. 272, PERB Case No. 90-U-10 (1991).
[83] *UDCFA/NEA v. UDC*, Slip Op. No. 272 at 5, PERB Case No. 90-U-10 (1991) (holding that the Board is not authorized to award attorney fees*); accord, Milton v. WASA*, Slip Op. No. 606 at 3, PERB Case Nos. 98-U-24 and 98-U-28 (1999); *WTU, Local 6 v. DCPS*, Slip Op. No. 1418 at 6-7, PERB Case No. 05-U-15(2013); *WTU, Local 6 v. DCPS*, Slip Op. No. 1642 at 15-16, PERB Case No. 14-U-02 (2017).
[84] *Zenian v. OEA*, 598 A.2d 1161 (D.C. 1991).

to award attorney fees in appropriate unfair labor practice cases under the CMPA and the Back Pay Act.

B. Background

The CMPA, D.C. Official Code §§ 1-601.1 to 1-637.2 (1987),[85] governs the rights of District of Columbia employees in personnel actions arising out of their employment. The *Zenian* decision provides a background summary of the interplay between the CMPA and the Back Pay Act:

> The CMPA was designed to replace an existing personnel system which was said to be in "disarray" and "chaos"—an "'inefficient hodge-podge system [that] ignore[d] the rudimentary merit rules' and 'awkwardly meshed' the District personnel apparatus with the federal personnel system." The state of the law under the CMPA, however, has yet to become a model of luminous clarity.
>
> Prior to the effective date of the CMPA, the Federal Back Pay Act (FBPA), now codified at 5 U.S.C. § 5596 (1988), applied to all employees of the District of Columbia government. The CMPA purported to supersede the FBPA as to District employees. Insofar as this attempted supersession applied to employees hired prior to January 1, 1980, it ran afoul of the Home Rule Act, D.C. Code § 1–242(3) (1987), which "provide[s] a floor for benefits under the [C.M.P.A.], equal to those applicable to federal employees immediately prior to enactment of District personnel legislation."
>
> …. [E]ffective March 4, 1981, the CMPA was amended by D.C. Law 3–130, 1979–1980 D.C. Stat. 544, now codified at D.C. Code § 1–612.4 (1987). Law 3–130 requires the Mayor to develop a new compensation system for all employees in the Career and Excepted Services. The statute further directs, subject to a proviso not here relevant, that [u]ntil such time as a new compensation system is approved, the compensation system, including the salary and pay schedules, in effect on December 31, 1979, shall continue in effect.[86]

The Back Pay Act provides attorney fees to employees as a remedy for the successful litigation of a grievance or unfair labor practice complaint resulting from the appeal of an unjustified or unwarranted personnel action resulting in back pay. The relevant section of the Back Pay Act states:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

[85] Renumbered to §§ 1-601.01 to 1-636.03 (2001).
[86] *Zenian v. OEA*, 598 A.2d 1161, 1163 (D.C. 1991) (citations omitted).

> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
>
> (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under § 7701(g) of this title.[87]

Under the Back Pay Act, an employee found to have been affected by an unjustified or unwarranted personnel action is entitled to reasonable attorney fees related to the personnel action, if the fees are in the interest of justice.[88] The Board has upheld attorney fees when presented with the question in the context of the Board's appellate jurisdiction.[89] The Board has held that the Back Pay Act is a general law applicable to the District of Columbia by its own terms and provides an entitlement for litigation expenses for a prevailing party.[90] Here, the Board must determine whether it has original jurisdiction under the CMPA to award attorney fees and whether an award of attorney fees is in the interest of justice.

C. District of Columbia Court of Appeals Treatment

DGS argues that the Back Pay Act and the Board have co-existed for decades and that the Board has never found that the Back Pay Act authorized attorney fees.[91] FOP contends that the Board has repeatedly and inaccurately stated that it lacks authority under the CMPA to award attorney fees.[92]

Previously, the Board found that it is not authorized to award attorney fees under the CMPA because there is no explicit statutory language empowering it to provide a remedy of attorney fees. The Board has stated that D.C. Official Code § 1-617.13, governing its remedial authority, does not refer to attorney fees nor is the Board given the authority to award attorney fees elsewhere.[93]

---

[87] *See* 5 U.S.C. § 5596(b).
[88] *See* 5 U.S.C §7701(g) ("The Board . . . may require payment by the agency involved of reasonable attorney fees incurred by . . . the prevailing party and the Board . . . determines that payment by the agency is warranted in the interest of justice including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.").
[89] *UDC v. AFSCME, Council 20, Local 2087*, 59 D.C. Reg. 15167, Slip Op. No. 1333, PERB Case No. 12-A-01 (2012), *aff'd sub nom*. *American Federation of State, County, and Muni. Empls. Dist. Council 20, Local 2087, AFL-CIO v. Univ. District of Columbia*, 166 A. 3d 967 (2017).
[90] *DCHA v. AFGE, Local 2725*, 62 D.C. Reg. 2893, Slip Op. No. 1503 at 3-5, PERB Case No. 14-A-07 (2015).
[91] Opp'n to Fees Br. at 5.
[92] Complainant Fees Br. at 2.
[93] *E.g., UDCFA/NEA v. UDC*, Slip Op. No. 272 at 5, PERB Case No. 90-U-10 (1991) (holding that the Board is not authorized to award attorney fees); a*ccord Milton v. WASA*, 47 D.C. Reg. 10102, Slip Op. No. 606 at 3, PERB Case

The Board never revisited its prior decisions on attorney fees or analyzed its authority in light of *Zenian*. In fact, the Board continued to rely upon *UDCFA/NEA v. UDC* without addressing, considering, or citing D.C. Official Code § 1-611.04(e),[94] which states that "[u]ntil such time as a new compensation system is approved, the compensation system, including the salary and pay schedules, in effect on December 31, 1979, shall continue in effect."[95]

In *Zenian,*[96] the D.C. Court of Appeals held that, in appropriate circumstances, the Back Pay Act applies to cases under the CMPA. In that case, an employee appealed an Office of Employee Appeals (OEA) decision, which denied an attorney fees request based on a finding that OEA lacked statutory authority under the CMPA to provide an award of attorney fees.

The *Zenian* decision relied upon a D.C. Court of Appeals decision, which held that attorney fees under the Back Pay Act were available to employees hired prior to January 1, 1980, as a concrete benefit required to be maintained by the Home Rule Act.[97] The court concluded that Mr. Zenian was hired after March of 1981, and thus he could not recover attorney fees unless the CMPA's "jump back" provision, D.C. Official Code § 1-611.04(e), included attorney fees in its definition of a "compensation system."[98]

The D.C. Court of Appeals held that, although the CMPA did not expressly mention attorney fees, D.C. Official Code § 1-611.04(e) incorporates the compensation system in effect on December 31, 1979, which includes the Back Pay Act and its explicit provision of attorney fees.[99] *Zenian* makes it clear that the Back Pay Act is not to be applied in a piecemeal fashion and that the attorney fee provision is an integral part of the compensation system in effect on December 31, 1979.[100] The D.C. Court of Appeals found that the Back Pay Act is incorporated into the CMPA. Consequently, the Board may rely on the Back Pay Act to award attorney fees in unfair labor practice cases consistent with the statutory language.[101]

DGS argues that the Back Pay Act's incorporation into the CMPA was superseded when the District adopted the District Personnel Manual (DPM) and the Council of the District of Columbia approved it.[102] DGS's argument is unpersuasive. On at least three occasions following the implementation of the DPM, the D.C. Court of Appeals has maintained that the attorney fees provision of the Back Pay Act continues to apply to District employees as a part of the "compensation system" that existed on December 31, 1979, which must be retained until a new

---

Nos. 98-U-24 and 98-U-28 (2000); *WTU, Local 6 v. DCPS*, Slip Op. No. 1418 at 6-7, PERB Case No. 05-U-15(2013); *WTU, Local 6 v. DCPS*, Slip Op. No. 1642 at 15-16, PERB Case No. 14-U-02 (2017).

[94] D.C. Official Code § 1-612.4(e) renumbered to §1-611.04(e), the "jump back" provision, states that "[u]ntil such time as a new compensation system is approved, the compensation system, including the salary and pay schedules, in effect on December 31, 1979, shall continue in effect."

[95] *See Zenian* at 1166 (holding that there is no deference to provide to an agency's construction of a statute when prior decisions do not construe the relevant statute).

[96] *Zenian v. OEA*, 598 A.2d 1161 (D.C. 1991).

[97] *Zenian* at 1163 (citing *District of Columbia v. Hunt*, 520 A. 2d 300, 303 (D.C.1987)).

[98] *Zenian* at 1164.

[99] *Zenian* at 1165.

[100] *Id.*

[101] *Zenian* at 1165-1166.

[102] D.C. Council Proposed Resolution No. 15-1045, deemed approved December 5, 2004.

system is adopted.[103] Further, the D.C. Court of Appeals has previously accepted the District's argument that the DPM "provides an interpretation of the [Back Pay Act] in concert with federal holdings" and therefore does not conflict with the "jump back" provisions incorporation of the Back Pay Act into the CMPA.[104]

The Back Pay Act provides an entitlement for attorney fees for a prevailing party when a request for attorney fees is warranted.[105] The D.C. Court of Appeals has found that the Back Pay Act, which authorizes attorney fee awards, is incorporated into the CMPA under D.C. Official Code § 1-611.04(e).[106] The Board has original jurisdiction to determine whether an unfair labor practice has been committed and to provide an appropriate remedial order under the CMPA.[107] A claim for attorney fees is an ancillary aspect of unfair labor practice litigation within the Board's jurisdiction.[108] Therefore, the Board concludes that it is authorized to award attorney fees under the CMPA's incorporation of the Back Pay Act, if such an award is appropriate.

D. Public Policy

"The rights of District of Columbia employees in personnel actions arising out of their employment are governed by the Comprehensive Merit Personnel Act (CMPA), D.C. [Official] Code §§ [1-601.01 to 1-636.03 (2001)]."[109] The *Zenian* decision noted that Congress and the Council of the District of Columbia intended to provide as comprehensive a system of employee rights and entitlements as possible.[110] The Back Pay Act provides a statutory reimbursement for attorney fees when a party prevails against the government for an unwarranted or unjustified personnel action. The Board's refusal to exercise its jurisdiction to award attorney fees under the CMPA in these narrow circumstances would deprive prevailing parties of their right to relief when an award of attorney fees is in the interest of justice. As the *Zenian* decision noted, a deprivation of attorney fees to successful litigants could have the potential chilling effect on the private enforcement of workplace rights.[111] Such a deprivation is inconsistent with the Board's mandate to establish a labor relations program that resolves allegations of unfair labor practices and protects the rights of employees.[112] Thus, the Board finds that it is in the public's interest and the interest of justice to award attorney fees when warranted.

E. Appropriateness of awarding attorney fees and the interest of justice

Back pay is authorized under the Back Pay Act when (1) an employee was affected by an unjustified or unwarranted personnel action; (2) the unjustified or unwarranted personnel action

---

[103] *See AFSCME District 20, Local 2087 v. UDC,* 166 A.3d 967, n. 5 (D.C. 2017); *AFGE v. WASA*, 942 A.2d 1108, 1112–13 (D.C. 2007); *White v. WASA*, 962 A.2d 258, 259 (D.C. 2008).
[104] *Walker v. Off. of the Chief Info. Tech. Officer*, 127 A. 3d 524, 530 (D.C. 2015).
[105] *DCHA v. AFGE, Local 2725*, 62 D.C. Reg. 2893, Slip Op. No. 1503 at 5, PERB Case No. 14-A-07 (2015).
[106] *Zenian* at 1165. D.C. Official Code § 1-612.4(e) renumbered to §1-611.04(e).
[107] D.C. Official Code § 1-605.02(3).
[108] *AFGE v. WASA*, 942 A.2d 1108, 1114 (D.C. 2007).
[109] *Zenian* at 1163. D.C. Code §§ 1-601.1 to 1-637.2 (1987) renumbered 1-601.01 to 1-636.03 (2001).
[110] *Zenian* at 1166 n.10.
[111] *Zenian* at 1166 n.10.
[112] D.C. Official Code §§ 1-617.01 and 1-617.02.

resulted in a withdrawal or reduction in the pay, allowances, or differentials of the employee; and (3) the withdrawal or reduction would not have occurred but for the unjustified action.[113]

Here, the first requirement is satisfied because the Hearing Examiner found that DGS's unfair labor practice directly affected the bargaining unit employees.[114] The second requirement is also met because DGS's unfair labor practice resulted in the loss of compensation for the affected employees.[115] Finally, it is clearly established that DGS's unfair labor practice caused the reduction in compensation.[116] The record demonstrates that the Back Pay Act permits an award of back pay for bargaining unit employees for DGS's unfair labor practice.

Furthermore, the Back Pay Act requires that an award of attorney fees follow the standards established by § 5 U.S.C. 7701(g), meaning that an award of attorney fees must be in the interest of justice. The D.C. Court of Appeals and the Board have accepted the non-exhaustive, illustrative list of examples in *Allen v. U.S. Postal Service*[117] to aid in determining whether an award of attorney fees is in the interest of justice.[118]

The parties do not dispute that the appropriateness of an award of attorney fees should be evaluated under the *Allen v. U.S. Postal Service* standards. *Allen* introduced factors to consider in determining whether attorney fees under the Back Pay Act are in the interest of justice.[119] *Allen* held that attorney fees may be awarded where: (1) the agency engaged in a prohibited personnel practice; (2) the agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency's actions are taken in bad faith; (4) the agency committed gross procedural error; or (5) the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[120]

In non-disciplinary cases, the most relevant factors in the Board's assessment of whether an attorney fees award is in the interest of justice will generally be *Allen* factor (2) whether the agency's actions are clearly without merit or wholly unfounded, and *Allen* factor (5) whether the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.[121]

---

[113] *Fed. Aviation Admin., Washington, D.C. &* Prof'l *Airways Sys. Specialists, MEBA*, 27 FLRA 230, 234–35 (May 29, 1987).
[114] *Id.* at 233 (holding that an unjustified or unwarranted personnel action is established when it is determined that the employee was affected by an unfair labor practice, including a refusal to bargain where the agency changes the conditions of employees without providing an opportunity to bargain).
[115] *AFGE Local 383 v. D.C. MRDDA*, Slip Op. No. 938 at 5 (2011) (citing *FOP/MPD Labor Committee v. MPD*, Slip Op. No. 261 at n. 3 (1991) (finding that employer-provided parking is part of employees' wages)).
[116] 27 FLRA 230 at 233-234 (holding that when the causal relationship is clearly established the Authority will order back pay as corrective action for the unfair labor practice to make the employee whole).
[117] 2 M.S.P.R. 420 (1980).
[118] *AFGE, Local 1975 v. DMV*, Slip Op. No. 1697 at 3, PERB Case No. 18-A-18 (2019) (citing *Surgent v. District of Columbia*, 683 A. 2d 493,495 (D.C. 1996)).
[119] *Allen v. U.S. Postal Service*, 2 M.S.P.R. 420 (1980).
[120] *Allen* at 429.
[121] *AFGE, Local 1633 v. Dep't of Vet. Aff's.,* 71 FLRA 211, 216-217 (2019).

The Hearing Examiner did not provide a recommendation as to whether an award of attorney fees was in the interest of justice. Therefore, the Board remands this issue for a recommendation applying the standards above.

V. Conclusion

The Board finds that the Hearing Examiner's Report and Recommendation is reasonable, supported by the record, and consistent with Board precedent. The Board concludes that DGS violated D.C. Official Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act. The Board finds that it is authorized to award attorney fees under the Back Pay Act and the CMPA. The Board remands the matter to the Hearing Examiner for a recommendation as to whether an award of attorney fees is in the interest of justice and, if found, the appropriate fee award.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Protective Services Division Labor Committee Unfair Labor Practice Complaint is granted.

2. The District of Columbia Department of General Services must cease and desist from interfering with, restraining, or coercing employees of the FOP in exercising their rights under the CMPA.

3. The District of Columbia Department of General Services must cease and desist from refusing to bargain.

4. The District of Columbia Department of General Services shall return to the *status quo ante* past practice of providing bargaining unit employees with free worksite parking.

5. The District of Columbia Department of General Services shall reimburse bargaining unit employees for their parking expenses at 64 New York Avenue NE from October 1, 2017, until the past practice of free worksite parking is reinstated.

6. The District of Columbia Department of General Services must provide reasonable notice if it wishes to change a past practice and must negotiate in good faith.

7. The District of Columbia Department of General Services shall within ten (10) days of issuance of this Decision and Order post a Notice on all bulletin boards where notices to bargaining unit employees are normally posted for thirty (30) days.

8. The District of Columbia Department of General Services shall notify the Board of the posting within fourteen (14) days after issuance of the decision and order requiring posting.

9. The Hearing Examiner shall make factual findings and conclusions as to whether an award of attorney fees is in the interest of justice and, if it is, whether the amount of attorney fees requested is appropriate. The Hearing Examiner shall base this decision on *Allen v. U.S. Postal Service* and the attorney fee briefs submitted by the parties in the record.

10. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By the unanimous vote of Board Chairperson Douglas Warshof, Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler

February 20, 2020

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 18-U-01, Op. No. 1739 was sent by File and ServeXpress to the following parties on this the 28th day of February 2020.

Rosann R. Romano
Murphy Anderson PLLC
1401 K Street NW, Suite 300
Washington, D.C. 20005

Michael Kentoff
Michael D. Levy
District of Columbia
Office of Labor Relations and Collective Bargaining
441 4th Street NW, Suite 820 North
Washington, D.C. 20001

/s/ Royale Simms
Public Employee Relations Board