Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Nurses Association,	
Complainant,	PERB Case No. 12-U-14
v.	Opinion No. 1259
District of Columbia Department of Mental Health,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

On January 3, 2012, Complainant District of Columbia Nurses Association ("Complainant" or "Union") filed an unfair labor practice complaint ("Complaint") against Respondent District of Columbia Department of Mental Health ("Respondent" or "Agency"). The Complaint alleges that the Agency implemented changes in tours of duty and work schedules for bargaining unit employees without first engaging in impact and effects bargaining with the Union. (Complaint at ¶¶ 4-7). The Agency filed an answer ("Answer") largely admitting the Union's allegations. (Answer at ¶¶ 4-7). On February 15, 2012, the Union filed a document styled Motion for Board Decision on Pleadings ("Motion"), which was opposed by the Agency ("Opposition").

II. Discussion

The facts of this case are undisputed. In early December 2011, the Union learned that the Agency planned to implement changes in the tours of duty and work schedules of multiple bargaining unit members. (Complaint at ¶ 4; Answer at ¶ 4). The Union requested impact and effects bargaining with the Agency, but had received no response as of the time the Complaint was filed. (Complaint at ¶ 5; Answer at ¶ 5). In its latest filing, the Agency asserts that the

parties entered into impact and effects bargaining on January 23, 2012, and included the sign-in sheet for the negotiation session as an exhibit. (Opposition at 2; Opposition Ex. 2).

A. Motion for Board Decision on the Pleadings

The Union seeks a decision on the pleadings, citing Board Rule 520.10, which states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." In the Answer, the Agency admitted to each of the Union's factual statements and did not raise any additional pertinent facts in the Opposition.

Therefore, because there are no disputed issues of fact to warrant a hearing, the Board may render a decision on the pleadings. Briefs and/or oral argument are not necessary to determine the outcome of this case. The Board grants the Union's request for a decision on the pleadings and will discuss the merits of the Complaint below.

B. Unfair Labor Practice Complaint

In the Complaint, the Union alleges that the Agency implemented changes in bargaining unit employees' tours of duty and work schedules without giving the Union the opportunity to engage in impact and effects bargaining. (Complaint at ¶¶ 4-7). The Union requested impact and effects bargaining on December 16, 2011 (Complaint at ¶ 5) and the Agency states that the parties entered into impact and effects bargaining on January 23, 2012. (Opposition at 2, Opposition Ex. 2).

Tours of duty and work schedules are management rights under Section 1-617.8(a) of the Comprehensive Merit Personnel Act ("CMPA"). The Board has held that "an exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of [that right]." *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain. *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). In its Opposition, the Agency asserts that it notified affected employees of the changes in late November 2011, but this notification does not relieve the Agency of the requirement to enter into impact and effects bargaining when timely requested by the Union. (Opposition at 2); *UDCFA/NEA*, Slip Op. No. 43. In the instant case, the undisputed facts are that the Union requested impact and effects bargaining within approximately fourteen days of learning of the changes. (Complaint at ¶ 4-5; Answer at ¶¶ 4-5). The Union's request for bargaining was timely.

When a union requests impact and effects bargaining, the agency is required to bargain before implementing the change. *Fraternal Order of Police/MPD v. Metropolitan Police Department*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). It is

undisputed that the Agency implemented changes to the work schedules and tours of duties of certain bargaining unit members before engaging in impact and effects bargaining (Complaint at ¶ 7; Answer at ¶ 7; Opposition at 2).

In light of the above, Respondent violated Section 1-617.04(a)(1) and (5) by implementing changes to a management right before engaging in impact and effects bargaining with the Union. Therefore, the Complaint is granted.

C. Remedies

The Board's remedial authority is provided under D.C. Code Section 1-605.2(3) and Section 1-617.13 of the CMPA. In the Complaint, the Union requested the following relief:

a) the Agency enter into impact and effect negotiations over the changes in working conditions affecting bargaining unit employees no later than ten calendar days of the issuance of the PERB order;
b) the Agency rescind the implemented changes in tours of duty and work schedules until the matter is fully bargained or impasse is reached;
c) the Agency post appropriate notice of the violation of law in all areas where bargaining unit employees work; and
d) any and all other relief deemed appropriate by the PERB, including costs.

(Complaint at ¶ 7).

As the parties began impacts and effects negotiations on January 23, 2012, the Union's request for an order from the Board directing the same is moot.

Respondent is not required to rescind the implemented changes in tours of duty and work schedules. 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. District of Columbia Department 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 operations; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. *Id.* In the instant case, rescinding the changed tours of duty and work schedules after approximately four months would likely disrupt the Agency's operations. Additionally, because decisions regarding work schedules and tours of duty are within the scope of management rights, bargaining cannot negate the Agency's decision.

Respondent must post a notice acknowledging its violation of the CMPA. The Board has recognized that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *Nat'l Assoc. of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47

D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Further, "it is in the furtherance of this end, *i.e.*, the protection of employee rights,...[that] underlies [the Board's] remedy requiring the post of a notice to *all employees* concerning the violation found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected." *Bagentose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991).

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, the Union established that an unfair labor practice was committed, but the circumstances do not indicate bad faith or otherwise justify an award in the interest of justice.

Therefore, the Union's request for costs is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Nurses Association's Motion for Board Decision on the Pleadings is granted.

2. The Unfair Labor Practice Complaint is granted.

3. The District of Columbia Department of Mental Health, its agents, and representatives shall continue to bargain with the District of Columbia Nurses Association, its agents, and representatives, over the impact and effects of the changes in tours of duty and work schedules implemented in December 2011.

4. The District of Columbia Department of Mental Health shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

5. The District of Columbia Department of Mental Health 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.

6. 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.

April 25, 2012.

Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH ("DMH"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1259, PERB CASE NO. 12-U-14 (April 25, 2012)

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

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1259.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from refusing to bargain collectively in good faith with the District of Columbia Nurses Association.

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.

WE WILL NOT, in any like or related manner, refuse to bargain collectively in good faith with the District of Columbia Nurses Association.

District of Columbia Department of Mental Health

Date:_____ By:_____

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 any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-U-14 was transmitted via Email and U.S. Mail to the following parties on this the 25th day of April 2012.

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