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**Government of the District of Columbia  
Public Employee Relations Board**

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In the Matter of:	)	
	)	
American Federation of Government Employees, Local 631	)	
	)	
Complainant	)	PERB Case No. 20-U-23
	)	
v.	)	Opinion No. 1743
	)	
District of Columbia Office of Labor Relations and Collective Bargaining, et al. <sup>1</sup>	)	<b>Motion for Preliminary Relief</b>
	)	
Respondent	)	
	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On March 31, 2020, the American Federation of Government Employees, Local 631 (Union) filed an Unfair Labor Practice Complaint (Complaint) against the District of Columbia Office of Labor Relations and Collective Bargaining, D.C. Department of Public Works, D.C. Department of General Services, D.C. Office of Planning, D.C. Office of Contracts and Procurement, D.C. Office of Zoning,<sup>2</sup> and D.C. Department of Environment and Energy (collectively the Agencies). The Union alleges that the Agencies violated the Comprehensive Merit Personnel Act (CMPA) by refusing to negotiate over the changes in working conditions unilaterally implemented in response to the coronavirus pandemic (COVID-19) and by failing to provide information necessary for the Union to fulfill its responsibilities.<sup>2</sup> The Union's Complaint was accompanied by a request for preliminary relief.

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<sup>1</sup> The D.C. Department of Public Works, D.C. Department of General Services, D.C. Office of Planning, D.C. Office of Contracts and Procurement, D.C. Office of Zoning, and D.C. Department of Environment and Energy

<sup>2</sup> The Office of Labor Relations and Collective Bargaining stated in its Brief that it does not represent the Office of Zoning because it is an independent agency not under the personnel authority of the Mayor. As of the date of this Decision and Order on preliminary relief, the Board does not have enough information to render a decision regarding the Department of Zoning. The Board notes that there were no specific allegations in the Complaint, Brief or Oral Argument of violations of the CMPA by the Department of Zoning.

On April 8, 2020, the Executive Director requested that the parties brief specified issues related to the request for preliminary relief. The Union and the Agencies each filed a brief on April 14, 2020. The Board heard oral arguments from all parties on April 20, 2020.<sup>3</sup> For the reasons stated herein, the preliminary relief is granted, in part, as described.

## II. Background

On March 11, 2020, the Mayor of the District of Columbia issued an Executive Order declaring a state of emergency in response to the public health emergency caused by COVID-19.<sup>4</sup> On March 17, 2020, the Council of the District of Columbia enacted the COVID-19 Response Emergency Amendment Act of 2020, (COVID-19 Emergency Act), which amended the District of Columbia Public Emergency Act and provided the Mayor with enumerated personnel powers to address COVID-19.<sup>5</sup> The language of the new section states in pertinent part:

Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.*) ("CMPA") or the rules issued pursuant to the CMPA, . . . or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:

- (A) Redeploying employees within or between agencies;
- (B) Modifying employees' tours of duty;
- (C) Modifying employees' places of duty;
- (D) Mandating telework;
- (E) Extending shifts and assigning additional shifts;
- (F) Providing appropriate meals to employees required to work overtime or work without meal breaks;
- (G) Assigning additional duties to employees;
- (H) Extending existing terms of employees;
- (I) Hiring new employees into the Career, Education, and Management Supervisory Services without competition;
- (J) Eliminating any annuity offsets established by any law; or
- (K) Denying leave or rescinding approval of previously approved leave.<sup>6</sup>

On March 16, 2020, the Union submitted a written request to bargain by email to the District's representative.<sup>7</sup> OLRCB responded to the email by stating "please advise as to what

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<sup>3</sup> Barbara Hutchinson presented oral arguments on behalf of the Union and Michael Levy of the Office of Labor Relations and Collective Bargaining presented oral arguments on behalf of the Agencies.

<sup>4</sup> Mayor's Order 2020-045 (March 11, 2020).

<sup>5</sup> COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-0247 (March 17, 2020)

<sup>6</sup> D.C. Official Code § 7-2304(b)(16).

<sup>7</sup> Complaint at 3.

terms and conditions of employment for which you would like to bargain....Without more specificity, I am not sure how to accommodate your request.”<sup>8</sup> On March 18, 2020, the Union submitted a bargaining proposal to OLRCB, which was confirmed by OLRCB as received.<sup>9</sup>

On March 20, 2020, the Department of Public Works (DPW) initiated changes in working conditions without bargaining, requiring some employees to transition to a 10-hour shift.<sup>10</sup> DPW implemented these changes under the COVID-19 Emergency Act.<sup>11</sup> The Agencies stated that this change was necessary to address staffing shortfalls, allowing employees to spend more time at home with their families, and permitting DPW to safely carry out its mission.<sup>12</sup> The same day DPW implemented these changes, the Union requested documentation authorizing DPW to unilaterally change work schedules. OLRCB responded to the Union’s request by email on the same day. OLRCB referred to the COVID-19 Emergency Act and D.C. Official Code § 1-617.08(a)(6) and stated “...the law does indeed allow for a change and modification of shifts without substantive bargaining with the union in this unprecedented and extraordinary situation.”<sup>13</sup>

### **III. Discussion**

Before the Board is the Union’s motion for preliminary relief. Board Rule 520.15 states, “The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board’s processes are being interfered with, and the Board’s ultimate remedy may be inadequate.” In order to grant a motion for preliminary relief, at least one of these conditions must be met. It is within this framework that the Board considers the Agency’s actions and arguments in determining whether to grant the Union’s request for preliminary relief.

#### **A. The Agencies have a statutory duty to bargain.**

The Union argues that the Agencies violated D.C. Official Code §1-617.04(a)(1) and (5) by refusing to negotiate with the Union over the changes in working conditions caused by COVID-19.<sup>14</sup> According to the Union, the current emergency legislation did not alter the Agencies’ duty to bargain with the Union.<sup>15</sup>

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<sup>8</sup> Union’s Exhibit 2.

<sup>9</sup> Complaint at 3.

<sup>10</sup> Agencies’ Br. at 3.

<sup>11</sup> Complaint at 3.

<sup>12</sup> Agencies’ Br. at 3.

<sup>13</sup> Union’s Exhibit 5.

<sup>14</sup> Complaint at 1.

<sup>15</sup> Union’s Br. at 4.

The Agencies raise D.C. Official Code §1-617.08(a)(6), which states that management has the right to “take whatever actions may be necessary to carry out the mission of the District government in emergency situations.” According to the Agencies, DPW’s actions with respect to operational shift changes were legal and proper. Furthermore, the Agencies state that, based on precedent from the National Labor Relations Board (NLRB) and the Federal Labor Relations Authority, there is no statutory duty to bargain during an emergency.<sup>16</sup> Finally, the Agencies claim that the Union has waived its right to bargain because the parties’ collective bargaining agreement incorporates D.C. Official Code § 1-617.08(a).<sup>17</sup>

The first issue before the Board is whether the Agencies had a statutory duty to bargain during the emergency. In general, it is an unfair labor practice to refuse to bargain in good faith.<sup>18</sup> D.C. Official Code § 1-617.08 affords certain rights to management, which are nonnegotiable. However, even as to such nonnegotiable management rights, management must, upon request by the union, still bargain the impact and effects of its exercise of those rights.

Specifically relevant to the current dispute, D.C. Official Code §1-617.08(a)(6) states that management retains the sole right to “take whatever actions may be necessary to carry out the mission of the District government in emergency situations.”<sup>19</sup> That right must be read in conjunction with the COVID-19 Emergency Act, which contains language enumerating the personnel actions the Mayor may take in section 301(a)(16), subsections (A)-(K).<sup>20</sup> The Council, by using the broad “notwithstanding clause,” evidenced its intent to have the newly enacted amendment narrow the scope of the statute’s earlier iteration.<sup>21</sup> The Board holds that the Council limited the authority of the Mayor during the pandemic emergency with respect to personnel actions and thereby limited the potential for broader action and impermissible erosion of collective bargaining rights in the name of an emergency. Therefore, the Board will treat actions enumerated in subsection (A)-(K) of the COVID-19 Emergency Act<sup>22</sup> taken during the pandemic as management rights, and those unilateral personnel actions are permitted in response to the current emergency. As stated above, management rights are nonnegotiable but are subject to impact and effects bargaining upon request.<sup>23</sup>

The Board also recognizes that some emergencies call for immediate action resulting in the suspension of the duty to bargain. However, the Board, like the NLRB, adopts a narrow view in applying this exception to the general duty to bargain. In *Port Printing*,<sup>24</sup> the NLRB explained a narrow exception to the duty to bargain during a financial emergency. The NLRB explained that the economic exigency exception is “limited to extraordinary events, which are an

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<sup>16</sup> Agencies’ Br. at 7.

<sup>17</sup> Agencies’ Br. at 9.

<sup>18</sup> D.C. Official Code §§ 1-617.04(a)(5) and (b)(3).

<sup>19</sup> D.C. Official Code § 1-617.08(a)(6).

<sup>20</sup> D.C. Official Code § 7-2304(b)(16).

<sup>21</sup> *UDC v. AFSCME, District Council 20, Local 2087*, 130 A. 3d 355, 359-360 (D.C. 2016).

<sup>22</sup> D.C. Code § 7-2304(b)(16).

<sup>23</sup> *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *DCNA v. DMH*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012)).

<sup>24</sup> *Port Printing & Specialties*, 351 NLRB 1269 (2007), *enfd.* 589 F.3d 812 (5th Cir. 2009).

unforeseen occurrence, having major economic effect requiring that the company take immediate action.”<sup>25</sup> “Absent a dire financial emergency. . . economic events such as a loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.”<sup>26</sup>

The facts of *Port Printing* are as follows. On September 22, 2005, an impending hurricane caused the mayor to order an immediate and citywide evacuation.<sup>27</sup> The company was compelled to take prompt action to respond to the hurricane and evacuation order.<sup>28</sup> The company closed its facility, resulting in a “forced layoff.”<sup>29</sup> Seven days later, the owners of the company returned to the facility to survey the damage. On October 8, 2005, the company began the cleanup process and contacted customers to finish jobs. To complete these tasks the company used several bargaining unit employees, nonbargaining unit employees, and at least one supervisor.<sup>30</sup>

The NLRB held that the layoff without bargaining was not unlawful because the hurricane created the economic exigency.<sup>31</sup> However, the NLRB found that the company committed an unfair labor practice by failing to bargain over the impact and effects of the layoff.<sup>32</sup> Additionally, the NLRB found that the company committed an unfair labor practice when it failed to bargain over the decision to use nonbargaining unit employees to finish work because the time for immediate decision-making had passed.<sup>33</sup>

The Board finds this reasoning persuasive. The Board holds that, in an instance of an extraordinary event, which was an unforeseen occurrence, requiring an agency to take immediate action, management has the right to take actions it deems necessary to carry out its mission. But it must bargain the impact and effects of its decision. Moreover, if during the state of emergency the need for immediate decision-making has passed, then management must engage in substantive bargaining over mandatory subjects of bargaining. The COVID-19 emergency and the law enacted by the D.C. Council permitted DPW to make the decision to transition to a 10-hour shift. The decision is a nonnegotiable management right.

A union has the right to impact and effects bargaining over a management right only when it makes a timely request to bargain.<sup>34</sup> An unfair labor practice is not committed until there

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<sup>25</sup> *Id.* at 1270 (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); see *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994)).

<sup>26</sup> *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007) (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995)).

<sup>27</sup> *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* All employees were out of work and it was unclear if they would return.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1270.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *DCNA v. DMH*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012)).

is a request to bargain and a “blanket” refusal to bargain.<sup>35</sup> Absent a request to bargain, management does not violate the CMPA by unilaterally implementing a management right.<sup>36</sup> But even a broad, general request for bargaining “implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable.”<sup>37</sup>

Regarding impact and effects bargaining, the Agencies state that at no time did they refuse to bargain.<sup>38</sup> During oral arguments, however, the Agencies’ representative stated that the Agencies are not available to participate in impact and effects bargaining because they are “stretched to the max” in supporting the District’s response to COVID-19.<sup>39</sup> They claimed that they are “honoring” collective bargaining obligations in other ways, specifically by holding two telephone conference calls during which D.C. officials described the steps they were taking to an audience of some 100 union representatives, who were not permitted to ask questions or make comments during the call.<sup>40</sup>

Impact and effects bargaining is not waived, suspended, or “on pause” during an emergency, as suggested by the Agencies’ representative.<sup>41</sup> The refusal to bargain is an unfair labor practice. It should also be noted that the CMPA states that “an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.”<sup>42</sup> The Board is unconvinced by the Agencies’ claim of having no time to bargain. Bargaining cannot be postponed until the end of the emergency, at which time the Board’s ultimate remedy may be inadequate. The Agencies’ posture is incompatible with an effective collective bargaining process.

## B. Information Requests

The duty to bargain collectively includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative.<sup>43</sup> The Board has held that “an agency is obligated to furnish requested information that is both relevant and necessary to a union’s role in: (1) processing of a grievance; (2) an arbitration proceeding; or (3) collective bargaining,” and that a failure to do so is an unfair labor practice.<sup>44</sup>

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<sup>35</sup> *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *FOP v. DOC*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002)).

<sup>36</sup> *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015).

<sup>37</sup> *NAGE, Local R3-06 v. WASA*, 47 D.C. Reg 7551, Slip Op. No. 635 at 6, PERB Case No. 99-U-04 (2000).

<sup>38</sup> Agencies’ Br. at 11.

<sup>39</sup> Transcript at 36.

<sup>40</sup> Transcript at 34.

<sup>41</sup> Transcript at 49.

<sup>42</sup> D.C. Official Code § 1-617.01(a).

<sup>43</sup> *FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 11371, Slip Op. No.1302 at 15, PERB Case Nos. 07-U-49, 08-U-13, and 08-U-16 (2012).

<sup>44</sup> *FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 6781, Slip Op. No. 1131 at 4, PERB Case No. 09-U-59 (2011).

The Union claims that the Agencies have denied information to the Union on shift changes and telework for bargaining unit members, as well as on employees' COVID-19 status.<sup>45</sup> The Union requests, as preliminary relief, that the Board order the Agencies to notify the Union of the department and work location where an employee is confirmed positive for COVID-19 and how many exposed employees were sent home on administrative leave for 14 days at the infected employee's location.<sup>46</sup> During oral argument, the Union's representative stated that "the District itself has not given any written response, per se to requests from the Union as the exclusive representative."<sup>47</sup>

The Agencies state that, in light of the overwhelming drain on management's time due to the COVID-19 response and the Board's reasonableness standard, the delay in responding to the information requests is not unreasonable and cannot constitute an unfair labor practice.<sup>48</sup> During oral argument, the Agencies' representative stated they are "engaging" with the Union in many ways, including city-wide phone calls and email communication.<sup>49</sup>

The Board finds that there is nothing in the management rights provisions of the CMPA or the COVID-19 Emergency Act to limit the Agencies' obligation to furnish requested information. The Agencies' efforts to engage with the Union through phone calls, conference calls, and emails do not satisfy the duty to provide relevant requested information. As stated above, the timing of providing the required information may be as practicable, but cannot be postponed to the end of the emergency when the Board's ultimate remedy may be inadequate.

### C. Preliminary Relief is Warranted.

As stated above, Board Rule 520.15 provides, "The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be inadequate."

In determining whether to exercise its discretion to order preliminary relief, the Board need not find irreparable harm.<sup>50</sup> The Board looks to evidence supporting the request for preliminary relief, which must "establish that there is reasonable cause to believe that the

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<sup>45</sup> Complaint at 4 and 5.

<sup>46</sup> Complaint at 6.

<sup>47</sup> Transcript at 19.

<sup>48</sup> Agencies' Br. at 12.

<sup>49</sup> Transcript at 33-34.

<sup>50</sup> *AFGE, Local 872 v. WASA*, 60 D.C. Reg. 16507, Slip Op. No. 1441 at 4, PERB Case No. 13-U-19 (2013)(citing *Automobile Workers v. National Labor Review Board*, 449 F.2d 1046 (D.C. 1971)).

[CMPA] has been violated and that the remedial purpose of the law will be served by *pendente lite* relief.”<sup>51</sup>

In the instant case, the Agencies’ repeated assertions that they have no duty to bargain are clear-cut and flagrant conduct. The Agencies have taken the declaration of an emergency as *carte blanche* to refuse to bargain and to implement unilateral changes. The very serious nature of the COVID-19 pandemic calls for swift and deliberate action, but that does not excuse the Agencies’ refusal to participate in collective bargaining. The Agencies’ actions seriously interfere with the Board’s process. The Board notes that, had the Agencies included the Union in its deliberations, they would likely not be hearing this case. Due to the rapidly changing situation concerning COVID-19, the declared state of emergency and the conditions at the Agencies, the Board’s ultimate remedy may be inadequate.

The Union requested that the Board order OLRCB to bargain with the Union immediately and provide the Union with the information that describes all changes made to working conditions in each agency represented by the Union.<sup>52</sup> As stated earlier, the Agencies have a duty to bargain over terms and conditions of employment; however management rights are nonnegotiable subjects of bargaining. The Council has explicitly listed enumerated rights during this emergency which the Board will treat as management rights. However, the Agencies still have an obligation to bargain over the impact and effects of a management rights decision, and the Agencies are obligated to furnish requested information.

The Union requests that the Board order the District to report the names of infected employees immediately to the D.C. Department of Health and all individuals confirmed positive with COVID-19 and that those potentially exposed to the infected individual be removed from the workplace and placed on administrative leave for 14 days in self-quarantine.”<sup>53</sup> To the extent that the Union requests the Board order the Agencies to report to the Department of Health, the Board does not have jurisdiction to require one agency to report to another agency. With respect to the Union’s request that the Board order individuals removed from the workplace and placed on administrative leave, this is outside the authority of the Board and would violate management’s right to modify employees’ tour of duty or place of duty under D.C. Official Code § 7-2304(b)(16)(B-C).

The Union requests that “the Board order the Union be notified ....of the department and work location where an employee is confirmed positive for COVID-19 and how many exposed employees were sent home on administrative leave for 14 days, at the infected employee’s location.”<sup>54</sup> The Board grants this request to the extent that it does not interfere with individuals’ privacy rights or the management right to modify employees’ tour of duty or place of duty under

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<sup>51</sup> Id.

<sup>52</sup> Complaint at 6.

<sup>53</sup> Complaint at 6.

<sup>54</sup> Complaint at 6. To the extent the Union requested the Board order the Department of Health be notified, as stated earlier, the Board does not have jurisdiction to require one agency to report to another agency.

D.C. Official Code § 7-2304(b)(16)(B-C). The Agencies must provide the Union with relevant, requested information regarding health and safety.

The Union requests that the Board order telework for all eligible employees until the Center for Disease Control declares the COVID-19 pandemic over. This request would be outside the powers of the Board in ordinary circumstances; in this case, mandating telework is explicitly listed as action to be taken by agencies under D.C. Official Code § 7-2304(b)(16)(D), a nonnegotiable management right.

The Union requests that the Board order that no employees be required, without necessary protective equipment, to work in unsanitized areas, or unsanitized vehicles, and/or in close contact with the public.<sup>55</sup> This request is outside the powers of the Board. However, the Board notes that the health and safety of employees is a mandatory subject of bargaining which must be negotiated.

#### **IV. Conclusion**

Based on the foregoing, the Board grants the Union's request for preliminary relief, in part.

#### **IT IS HEREBY ORDERED THAT:**

1. The American Federation of Government Employees, Local 631's Request for Preliminary Relief is granted, in part.
2. The Department of Public Works shall bargain forthwith with the American Federation of Government Employees, Local 631 over the impact and effects of the transition to a 10-hour shift.
3. The Agencies, their agents and representatives, shall provide relevant requested information to the American Federation of Government Employees, Local 631 regarding health and safety conditions at the Agencies' facilities.
4. The Agencies shall advise the Board within 7 days of the issuance of this Decision of the actions they have taken to implement this Order.
5. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

#### **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

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

April 23, 2020

Washington, D.C.

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<sup>55</sup> Complaint at 6.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 20-U-23, Opinion No. 1743 was sent by File and ServeXpress to the following parties on this the 24<sup>th</sup> day of April, 2020.

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/s/ Merlin M. George  
PERB