Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Metropolitan Police Department Labor Committee Complainant, v. District of Columbia Metropolitan Police Department, Chief Cathy L. Lanier and Commander James Crane, Respondents.	PERB Case No. 08-U-19 Opinion No. 991 **CORRECTED COPY**

DECISION AND ORDER

I. Statement of the Case:

This matter involves an unfair labor practice complaint ("Complaint") filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP", "Union" or "Complainant") against the District of Columbia Metropolitan Police Department, Chief Cathy L. Lanier and Commander James Crane ("MPD" or "Respondents). In the Complaint, FOP claimed that Respondents "committed an unfair labor practice by implementing a new policy that impacts the canine unit and changes the working conditions of its members, and the language of the collective bargaining agreement, without first bargaining in good faith with the Union." (Complaint at p. 1). The Complaint states that the Respondents are in violation of the collective bargaining agreement ("CBA"), D.C. Code § 1-612.01[1], D.C. Code § 1-617.06(a)(2), and Special

[1] D.C. Code § 1-612.01 – Hours of Work, provides in relevant part:

Order 99-20. The Complainant requests that the Board find "[MPD] and Chief Lanier [to] have engaged in an unfair labor practice in violation of D.C. Code § 1-617.04(1) and (5)."[2] (Complaint at pgs. 5-6).

The Respondents filed an Answer denying the allegations set forth in the Complaint ("Answer"). In addition, the Respondents assert the affirmative defense that "[s]ince the Complaint alleges unilateral changes to terms and conditions of employment covered by the parties' collective bargaining agreement, the Board does not have

---

(a) A basic administrative workweek of 40 hours is established for each full-time employee and the hours of work within that workweek shall be performed within a period of not more than 6 of any 7 consecutive days . . .

(b) Except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, tours of duty shall be established to provide, with respect to each employee in an organization, that:

(1) Assignments to tours of duty are scheduled in advance over periods of not less than 1 week;

(2) The basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive;

(3) The working hours in each day in the basic workweek are the same;

(4) The basic nonovertime workday may not exceed 8 hours;

(5) The occurrence of holidays may not affect the designation of the basic workweek; and

(6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday except under rules and regulations on flexible work schedules as provided in subsection (e) of this section.

. . .

(e) The Mayor shall issue rules and regulations governing hours of work. Such rules and regulations shall provide for the use of flexible work schedules within the 40 hour workweek when such schedules are considered both practicable and feasible.

[2] D.C. Code § 1-617.04 provides in relevant part:

(a) The District, its agents, and representatives are prohibited from:
(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

. . .

(5) Refusing to bargain collectively in good faith with the exclusive representative.

jurisdiction over the Complaint." (Answer at p. 3). Therefore, Respondents request that the Board dismiss the Complaint. (See Answer at p. 4).

The matter was referred to a Hearing Examiner and a hearing was held. Following the hearing, both parties submitted post-hearing briefs. On September 29, 2008, the Hearing Examiner issued a Report and Recommendation ("R&R"), finding that "[t]he record evidence therefore supports a finding the MPD committed an unfair labor practice in this case by refusing to engage in impacts and effects bargaining upon request." (R&R at p. 11). As a result, the Hearing Examiner recommended that the Board direct: (1) MPD to post a notification acknowledging its unfair labor practice violation; (2) MPD to pay FOP reasonable costs and attorneys' fees associated with this proceeding; (3) MPD to cease and desist from implementing a new policy affecting Bargaining Unit employees after the FOP has requested impacts and effects bargaining. (See R&R at pgs. 12-13).

The Respondents submitted Exceptions to the Hearing Examiner's R&R ("Exceptions"). The Complainant filed an Opposition to the Respondents' Exceptions ("Opposition"). The Hearing Examiner's R&R, the Respondents' Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

The Hearing Examiner found the following two issues relevant for a determination in this matter:

> 1. Whether the Board has jurisdiction to consider an unfair labor practice complaint based, in part, on allegations that a unilateral scheduling change impacts the duties and responsibilities of members the Canine Unit?
>
> 2. If so, whether MPD committed an unfair labor practice when it initially met with representatives of the Bargaining Unit over the proposed change and subsequently failed to continue those talks as requested by the union representatives?

(R&R at p. 5).

In addition, the Hearing Examiner made the following factual findings:

> On October 10, 2007, Metropolitan Police Department . . . Commander James Crane, Special Operations Division, issued a memorandum detailing a new crime fighting initiative of the Chief of Police, "Handler Deployment Outline," for the canine team that was designed to "provide District Commanders with the ability to utilize

> MPD's canine assets to address specific crime related issues within their respective districts.

(R&R at p. 1).[3]

FOP's Position

At the hearing, the FOP argued that MPD "unilaterally changed the existing canine deployment policy and failed to respond to FOP's repeated demands to bargain over the new policy's impact and effect on its members." (R&R at p. 5). In support of its allegations, the FOP presented testimony that prior to the implementation of the new policy, FOP Chairman Kristopher Baumann and Vice Chairman Wendell Cunningham met with MPD officials, as well as MPD's general counsel and discussed possible implementation of the new policy. (See R&R at p. 6). The Hearing Examiner found that "the parties agreed to a subsequent meeting to discuss the issue . . . MPD cancelled the follow-up meeting and Chairman Baumann heard nothing further from MPD on the issue even though he continued to try to reschedule a follow-up meeting." (R&R at p. 6). The Hearing Examiner also noted that no formal request or written demand for bargaining over the impacts and effects of the implementation of the new policy was made by FOP to MPD or Chief Lanier. (See R&R at p. 6).

FOP also presented testimony and evidence that after implementation of the new policy, the "schedule change impacted the duties of canine handlers." (R&R at p. 6). Specifically, FOP claimed that:

> moving canine handlers into the districts would impact the Department of Justice requirements mandating that only Canine officials authorize release of a canine when a bite could be anticipated. According to Chairman Bauman, it was unclear whether there would be a change in the chain of command. As another example, Chairman Bauman noted the institution of rotating watches for all three shifts where previously the midnight shift had been fixed. A third example Chairman Bauman gave was the assignment of canine units to "foot beat positions" within a district which he opined would limit their ability timely to assist officers in tracking fleeing suspects.

---

[3] The Attachments to the Complaint reveal that according to an October 10, 2007 memorandum from Commander Crane of the Special Operations Division, "the 'Handler Deployment Outline' clarifies the administrative and logistical matters relating to the initiatives implementation." (Complaint at Attachment 2). The "Handler Deployment Outline" specifies matters related to the canine unit officers': (1) administrative duties; (2) scheduling; (3) recalling to support an event or operation; (4) duties and assignments; and (5) roll-call and check-off. (See Complaint at Attachment 2).

(R&R at p. 7) (citations to transcript omitted).

FOP also supplied the corroborating testimony of Canine Unit Officer Plunkett that:

> prior to late 2007 . . . he did not ever report to roll call at any particular district and the midnight shift was a fixed shift within the Canine Unit. After the policy was implemented, [he] testified that his duties changed in the following ways: 1) he was restricted to patrolling like a "regular" base officer rather than being able to patrol known hot spots; 2) he was required to rotate through all three shifts, including the midnight shift that he had worked only once previously in his 18-year career with MPD; and 3) he could not respond directly to calls for assistance as he previously had but, rather, would have to go through Dispatch and the watch commander before responding.
>
> Officer Plunkett reiterated the fact that under the new policy the midnight shift changed from being a fixed shift to a being a rotating shift. And, according to Officer Plunkett, once he was assigned to the districts, no one in charge of rating his performance ever actually observed him performing his duties even though he received a rating during that period.

(R&R at pgs. 7-8) (citations to transcript omitted).

MPD's Position

The Hearing Examiner found that MPD's position contended that:

> the unilateral change is to scheduling only and because scheduling is a topic covered by Art. 24 of the CBA, [the] Board has no jurisdiction to consider the complaint filed here. In support of its jurisdictional challenge, MPD offered the testimony of Lieutenant Victor Braschnewitz, a former 10-month member of the Canine Unit. Lt. Braschnewitz first contradicted Commander Crane's written statement that "[t]he Chief of Police has instituted a new crime fighting initiative that expands the role of the canine team" by testifying, that "[t]he expansion of the role, to imply that there was an expanded role for the officers themselves of the handlers is actually incorrect". He then testified that, in fact, the "true" duties of canine handlers were unchanged by the new policy.

(R&R at pgs. 8-9) (citations to transcript and exhibits omitted).

Hearing Examiner's Discussion

The Hearing Examiner provided discussion and findings on two issues: (1) Board jurisdiction; and (2) the unfair labor practice charge. (R&R at pgs. 9-10).

A. Jurisdiction

Regarding the Board's jurisdiction, the Hearing Examiner found that:

> [t]he parties agree that the exercise of the Board's jurisdiction is limited to circumstances in which an agency is charged with refusing to bargain in good faith over matters not covered by the CBA. . . . Where a union bases its complaint on the "unilateral actions of the employer in derogation of its obligation to bargain in good faith"- rather than makes a claim for breach of contract - jurisdiction of the complaint properly lies in the Board. A union has a right, and an agency has an obligation, to bargain in good faith over the impacts and effects of an agency's decision that itself is not subject to collective bargaining.

(R&R at p. 9) (citations omitted).[4]

The Hearing Examiner concluded that the Board does have jurisdiction in this matter. Specifically, the Hearing Examiner stated:

> Here, the FOP alleges that scheduling changes would impact the canine handler's duties and responsibilities and that MPD's failure to bargain in

---

[4] The Hearing Examiner cites *Washington Teachers' Union, Local 6 v. Dist. of Columbia Public Schools*, Slip Op. No. 271 at p. 1, PERB Case No. 90-U-28 (1991). In that case:

> the Complainant Washington Teachers' Union, Local 6, AFL-CIO (WTU) filed [an] Unfair Labor Practice Complaint with the [Board] charging that the Respondent District of Columbia Public Schools (DCPS) violated D.C. Code Section 1-618.4(a)(1) and (5) of the Comprehensive Merit Personnel Act (CMPA) by effecting changes in terms and conditions of employment through promulgation of an August 21, 1990 memorandum unilaterally, without notice to the Union, and without bargaining.

In addition, the Hearing Examiner cites *Int'l Brotherhood of Police Officers, Local 446 v. Dist. of Columbia Gen. Hosp.*, Slip Op. No. 312 at p. 1, PERB Case No. 92-U-06 (1994), which involves:

> an Unfair Labor Practice Complaint . . . charging that the Respondent District of Columbia General Hospital (DCGH) had violated D.C. Code Sec. 1-618.4(a)(1)(2)(3) and (5) of the Comprehensive Merit Personnel Act (CMPA). IBPO alleged that DCGH unilaterally implemented a new night shift security post, thereby effecting a significant change in working conditions of bargaining unit employees and thereafter refusing to bargain with IBPO, the exclusive representative of the affected employees.

> good faith over the anticipated impacts and effects of the changes constitutes an unfair labor practice. The Board properly has jurisdiction to consider the FOP's allegations that MPD refused to engage in good faith in impact and effects bargaining.

(R&R at pgs 9-10) (citation omitted).

In addition, the Hearing Examiner noted that to the extent that "FOP's complaint is based on a unilateral change to scheduling, the Board is without jurisdiction to consider such a charge as it is covered by Art. 24 of the CBA. The parties, therefore, are referred to the grievance and arbitration procedures of the CBA for resolution of that issue." (R&R at pgs. 9-10, n. 3).

B. Unfair Labor Practice Charge

Having determined that the Board has jurisdiction, the Hearing Examiner focused on the unfair labor practice charge. The Hearing Examiner concluded that MPD had violated the CMPA by failing to meet its duty to bargain over the impact and effects with FOP concerning the implementation of a new policy regarding the deployment of canine unit officers. (See R&R at pgs. 10-12). The Hearing Examiner broke down the discussion of this issue into two parts, whether: (1) FOP made an appropriate demand for bargaining; and (2) the record evidence supported a finding that MPD refused to engage in impact and effects bargaining. (See R&R at pgs. 10-11).

As to whether FOP made an appropriate demand for bargaining, the Hearing Examiner found:

> [t]he parties agree that the FOP did not file a formal, written, request for such bargaining but they differ on the question of whether such a written request is required. Neither party cites any precedent covering the topic and it appears to be one of first impression. Nevertheless, the Board's decision in *Nat'l Ass'n. of Government Employees, Local R3-06 v. D.C. Water and Sewer Auth.*, Slip. Op. No. 635, PERB Case No. 99-U-04 (2000) is instructive. There the Board held that a broad, general, request for impact and effects bargaining may be sufficient to trigger an agency's obligation to participate in such bargaining.

(R&R at p. 10).[5]

---

[5] In *Nat'l Ass'n. of Government Employees, Local R3-06 v. D.C. Water and Sewer Auth.*, Slip Op. No. 635 at p. 1:

Based upon the record evidence, the Hearing Examiner determined that the communications from FOP officials to MPD concerning the new canine unit policy constituted an appropriate request for impact and effects bargaining. (See R&R at p. 10-11). The Hearing Examiner rejected MPD's argument that a request for bargaining must be made in writing. (See R&R at p. 11, n. 6). The Hearing Examiner concluded that a request for bargaining had been properly communicated to MPD and determined that the record evidence supported a finding that MPD had refused to engage in impacts and effects bargaining. (See R&R at pgs. 11-12). Specifically, the Hearing Examiner noted that:

> MPD cancelled the previously-agreed upon meeting, and ceased communications with FOP officials, its actions signaled a refusal of the request. The record evidence therefore supports a finding the MPD committed an unfair labor practice in this case by refusing to engage in impacts and effects bargaining upon request.

(R&R at p. 11).

C. Hearing Examiner's Recommendations

Based upon the foregoing, the Hearing Examiner made the following recommendations:

> NAGE assert[ed] that WASA committed unfair labor practice violations by: (a) refusing to bargain on request on the impact and implementation of new performance ratings, a reorganization, and reapplication procedures; (b) failing to select four bargaining unit employees, including two newly-elected officers of the local, for continuing employment in WASA's financial operations; (c) transferring six bargaining unit employees *to* temporary positions; and (d) placing bargaining unit employees in positions improperly classified by WASA as non-bargaining unit positions. NAGE also allege[d] that the collective bargaining agreement requires negotiations, upon request, over the impact and implementation of managerial decisions, including proposed reductions-in-force.

The Board concluded that the Hearing Examiner properly found that:

> Notwithstanding the lack of clarity in NAGE's demands for negotiations over the reorganization . . .that, under Board precedent, 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." *International Brotherhood of Police Officers. Local 446 v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322 at pgs. 3-4, PERB Case No. 91-U-14 (1992). Therefore, the Hearing Examiner concluded that, NAGE's request to bargain was sufficient to trigger "WASA's obligation to bargain over the impact and effect of its decision before implementing its reserved decision."

(*Id.* at p. 6).

1. The Board should direct MPD to post a notification acknowledging its violation;

2. The Board should direct MPD to pay the union reasonable costs and attorneys' fees associated with this proceeding; and

3. The Board should direct MPD to cease and desist from implementing a new policy affecting Bargaining Unit employees after the union has requested impacts and effects bargaining.

(See R&R at pgs. 12-13).

III. Respondents' Exceptions

In its Exceptions, Respondents assert that:

> since the scheduling changes implemented as a result of the canine initiative were covered by the parties collective bargaining agreement, Respondent had no obligation to negotiate over them. Respondent submits that the FOP's verbal demand to bargain made to employees acknowledged to be without authority to bargain over the Chief of Police's initiative were insufficient to trigger an obligation to bargain. Finally, respondent submits that the recommended award in this case is not supported by the record or Board precedent.

(Exceptions at p. 1).

Respondents' first exception concerns its claim that, "[s]ince the scheduling changes implemented by the canine initiative are covered by the parties' CBA, Respondent had no obligation to negotiate the impacts and effects of the changes." (Exceptions at p. 5). Specifically, Respondent states that the "Article 24 of the parties' CBA comprehensively addresses the issue of scheduling." (Exceptions at p. 6).[6] In

---

[6] Article 24 of the parties CBA provides as follows:

> **Section 1**
> Each member of the Bargaining Unit will be assigned days off and tours of duty that are either fixed or rotated on a known regular schedule. Schedules shall be posted in a fixed and known location. Notice of any changes to their days off or tours of duty shall be made fourteen (14) days in advance. If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor

addition, Respondents assert that "[b]y its plain language, this article represents the agreement between the parties as to how scheduling and scheduling changes are to occur." (Exceptions at p. 6).

In support of this exception, the Respondents ask that Board consider adopting the "covered by" doctrine, used by the Federal Labor Relations Authority ("FLRA") and National Labor Relations Board ("NLRB"). (See Exceptions at pgs. 6-10).[7] Respondents argue that "[p]ut simply, the 'covered by' doctrine provides that parties to a collective bargaining agreement have no obligation to engage in mid-term negotiation over subjects covered by the agreement." (Exceptions at p. 7) (Citation omitted, see footnote 5 *infra*). The Respondents state that the "Board has not had occasion to rule on the 'covered by' doctrine. . . . [but that] [i]n such circumstances, the Board looks to precedent set by other labor relations authorities, such as the National Labor Relations Board and the Federal Labor Relations Authority." (Exceptions at p. 9, citing *FOP/MPD Labor Committee v. D.C. Metropolitan Police Department*, PERB Case No 99-U-27, Opinion No 649, 48 DCR 8128 (2001) at 5 *citing Forbes v Teamsters Local 1714,* PERB Case No 88-U-20, Opinion No 229, 36 DCR 7107 (1989)).

In the present matter, the Hearing Examiner clearly indicated that to the extent that "FOP's complaint is based on a unilateral change to scheduling, the Board is without jurisdiction to consider such a charge as it is covered by Art. 24 of the CBA. The parties, therefore, are referred to the grievance and arbitration procedures of the CBA for resolution of that issue." (R&R at pgs. 9-10, n. 3). However, the Hearing Examiner credited the testimony and evidence submitted by the Complainant at the hearing, and found that the scheduling involved in the implementation of the new canine unit

---

Standards Act. The notice requirement is waived for those members assigned to the Executive Protection Unit and the Office of Professional Responsibility.

Section 2
The Chief or his/her designee may suspend Section 1 on a Department wide basis or in an operational unit for a declared emergency, for crime, or for an unanticipated event.

Section 3
Changes in scheduled days off will not be used for discipline except as provided in Article 12, Section 13 of this Agreement.

Section 4
Shift changes during a scheduled period made voluntarily at the request of an officer and upon approval of the Employer shall not require additional compensation.

[7] Respondents cite the following authority as instructive regarding the "covered by" doctrine: *Internal Revenue Service and National Treasury Employees Union,* 17 F.L.R.A. 731 (FLRA 1987); *Department of Navy, Marine Corps Logistics Base v. Federal Labor Relations Authority*, 962 F.2d 48, 56 (D.C. Cir. 1992) (Navy) *citing NLRB v. Jacobs Mfg. Co.,* 196 F.2d 680, 684 (2d Cir. 1952); *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB,* 288 App. D.C. 363, 927 F.2d 635, 640 (D.C. Cir. 1991); and *United Mine Workers of Am., Dist. 31 v. NLRB,* 279 App. D.C. 93, 879 F.2d 939, 943-44 (D.C. Cir. 1989).

deployment policy affected the duties and responsibilities of the canine unit officers not covered by the parties' CBA. (See R&R at pgs. 6-10). The Hearing Examiner also credited the testimony of the FOP's witnesses that other duties and responsibilities impacted the working conditions of canine officers by the implementation of the new policy.[8] The Respondent makes no exception to this aspect of the Hearing Examiner's findings.[9]

Concerning the "covered by" argument raised by MPD, the Board finds that it is unnecessary to determine whether the "covered by" doctrine utilized by the FLRA and NLRB should be adopted in the present matter. As stated above, the Board has adopted the Hearing Examiner's recommendation that the Complaint, as it relates to scheduling covered by Article 24 of the parties' CBA, is not within the Board's jurisdiction, and is dismissed. Moreover, Board precedent is consistent with the "covered by" doctrine. The Board has held that a unilateral change in established and otherwise bargainable terms and conditions of employment does not constitute an unfair labor practice under the CMPA, when such terms or conditions are specifically covered by the provisions of a collective bargaining agreement in effect between the parties. See *American District of Columbia Fire Department*, 39 DCR 8599, Slip Op. 287, PERB Case No. 90-U-11 (1991). "As a previously negotiated matter committed to the provisions of an effective collective bargaining agreement, [a party's] alleged unilateral change [would] not constitute a refusal to bargain in good faith. . ." *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 43 DC Reg. 5594, Slip Op. No. 387, PERB Case No. 93-U-22 (1994).

The Board finds that the arguments concerning Article 24 of the CBA presented in MPD's Exceptions were the same arguments considered by the Hearing Examiner. However, as stated above, the Hearing Examiner also found that the Board did have jurisdiction because the Complainant established that other duties and responsibilities were impacted by the unilateral implementation of the Handler Deployment Policy which did not involve scheduling. The Respondents' Exceptions do not argue that the Hearing Examiner erred in making these findings. The Board has held that it will adopt a Hearing Examiner's recommendation if it finds that, upon review of the record, that the Hearing Examiner's analysis, reasoning and conclusions are rational, reasonable,

---

[8] The Board notes that "scheduling" was only one of topics outlined in the Handler Deployment Policy. (See Footnote 3, *infra.*)

[9] The Board has held that a mere disagreement with the Hearing Examiner's findings of fact do not constitute a valid exception **or** support a claim of reversible error. See *Hoggard v. District of Columbia Public Schools*. 46 DCR 4837, Slip Op. No. 496, PERB Case 95-U-20 (1996). The Board has held that a Hearing Examiner has the authority to determine the probative value of evidence and to draw reasonable inferences from that evidence. See *Id.* The Board has also held that a mere disagreement with a Hearing Examiner's factual findings based on competing evidence is not a valid exception where the record evidence also supports the Hearing Examiner's finding. See *Id.*

persuasive and supported by the record. See *D.C. Nurses Association and D.C. Department of Human Services*, 32 DCR 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985) and *D.C. Nurses Association and D.C. Health and Hospitals Public Benefit Corporation*, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-02 (1999). Whereas the Board finds the Hearings Examiner's findings and conclusions to be rational, supported by the record and consistent with Board precedent, the Respondents' exceptions are denied and we adopt the Hearing Examiner's finding that the Respondents unilaterally implemented a new canine unit deployment policy in violation of the CMPA by failing to bargain over the impacts and effects of the implementation of the new policy.

Respondents' second exception argues that "should the Board determine that the Respondent[s] [were] obligated to negotiate the impacts and effects of the canine initiative, the Board should hold that the verbal requests to bargain did not constitute proper demands for bargaining." (Exceptions at p. 10). The Respondents concede that "[w]hile there is no statutory requirement that such impact and effect bargaining demands be made in writing, and Examiner Hayes suggests that this issue appears to be one of first impression (see Report at 10), the CMPA and the Board's precedent, strongly suggest that a written demand is needed." (Exceptions at p. 10).

As stated above, the Hearing Examiner determined that the request in this case did not need to be in writing or made specifically to the Chief of Police. The Board finds that the record supports the Hearing Examiner's conclusion, where it is based upon the undisputed testimony that MPD was properly given notice of FOP's desire to bargain over the impact and effects of the implementation of the new policy, and that MPD refused to bargain prior to implementation of the new policy. In view of the above the question concerning whether there has been a proper request for impact and effect bargaining, is often an issue of fact. Consequently, the Board adopts the Hearing Examiner's finding that the Respondents committed an unfair labor practice by refusing/failing to bargain in good faith concerning the implementation of the new canine unit deployment policy.

Lastly, the Respondents contend that "there is no basis for the recommended remedies." (Exception at p. 12). Specifically, the Respondents disagree with the recommended remedy that "[t]he Board should direct MPD to pay the union reasonable costs and attorneys' fees associated with this proceeding." (R&R at p. 12).

In *AFSCME, District Council 20, Local 2776, AFL-CIO v. D. C. Department of Finance and Revenue*, 36 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1989), the Board held that in order for an award of costs to be justified, several criteria must be met.

> First, any such award of cots necessarily assumes that the party to whom the payment is to be made must have been successful in at least a significant part of the case, and the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this of course is the nub 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. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot now foresee. What we can say here is that among the situations 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 bargaining representative.

AFSCME, District Council 20, Slip Op. No. 245 at pgs. 4-5 (Emphasis in original).

In the present case, the Board finds that the Hearing Examiner has not provided an analysis concerning the appropriate criteria for the award of costs. In addition, based upon the record, there is no indication that the Respondents acted in bad faith, where they believed that based upon the provisions of Article 24 of the parties' CBA, it had met its bargaining obligation. Consequently, the Board believes that the interest of justice standard required to award reasonable costs does not exist in this case.

The Board also rejects the Hearing Examiner's recommended award of attorneys' fees because the Board has held that it does not have authority to award attorneys' fees. See *AFGE Local 2725 v. District of Columbia Department of Health and Office of Labor Relations and Collective Bargaining,* PERB Case No 05-U-30, Opinion No 841, 54 DCR 2876 (2006) at 16, *quoting Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, PERB Case No 95-U-02, Opinion No 451 at 8, 47 DCR 769 (1995) and *citing* International *Brotherhood of Police Officers, Local1446, AFL-CIO v. District of Columbia General Hospital*, PERB Case No 91-U-14, Opinion No 322, 39 DCR 9633 (1992) and *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, PERB Case No 91-U-10, Opinion No 272, 38 DCR 2463 (1991).

The Hearing Examiner also recommended that the Board direct the Respondents to post a notice acknowledging their violation of the CMPA. The Board has

"recognize[d] 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." *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). "Also, a notice posting requirement serves as a strong warning against future violations." *Wendell Cunningham v. FOP/MPD Labor Committee*, 47 DCR 7773, Slip Op. No. 682 at p. 10, PERB Case Nos. 01-U-04 and 01-S-01 (2002). In light of the above, the Board adopts the Hearing Examiner's recommendation that MPD post a notice to all employees concerning the violations found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected. By requiring the Respondent to post a notice, "bargaining unit employees . . . would know that [the Respondent] has been directed to comply with their bargaining obligations under the CMPA." *Id.* at p. 16.

Pursuant to D.C. Code § 1-605.02 (3) (2001) and Board Rule 520.14, the Board, having reviewed the findings, conclusions and recommendations of the Hearing Examiner, and finding those recommendations related to the Respondents' duty to bargain to be reasonable, persuasive and supported by the record, adopt the Hearing Examiner's recommendations to the Board. However, the Board rejects the Hearing Examiner's recommended award of costs and attorneys' fees.

Consistent with the above discussion, the Hearing Examiner's recommended remedy is modified and Respondents' exception is granted in part.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department ("MPD") its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by unilaterally implementing the Handler Deployment Policy.

2. MPD shall cease and desist from violating: (a) D.C. Code § 1-617.04(a)(1) by interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act ("CMPA"); and (b) D.C. Code § 1-617.04(a)(5) by refusing to bargain collectively in good faith with the exclusive representative.

3. MPD is directed to engage in impact and effects bargaining with the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP",

"Union" or "Complainant") concerning the impact and effects of the implementation of the Handler Deployment Policy except as it relates to the scheduling of canine unit officers covered by Article 24 of the parties' collective bargaining agreement.

4. MPD 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. MPD shall notify the Public Employee Relations Board ("Board"), in writing within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly. In addition, MPD shall notify the Board of the steps it has taken to comply with paragraph 3 of this Order.

6. Pursuant to Board Rule 559.1, and for purposes of § D.C. Code 1-617.13(c), this Decision and Order is effective and final upon issuance.

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

September 30, 2009

PERB Public Employee Relations Board

Government of the District of Columbia

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT, 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. 991, PERB CASE NO. 08-U-19 (SEPTEMBER 30, 2009).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us 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. 991.

WE WILL cease and desist from refusing to bargain in good faith with the Fraternal Order of Police/Metropolitan Police Department Labor Committee by failing to bargain over the impact and effects of implementation of the Handler Deployment Policy.

WE WILL NOT, in any like or related manner: (1) interfere, restrain, coerce employees from exercising or pursuing their protected rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.; or (2) refuse to bargain collectively in good faith with the exclusive representative of our employees.

District of Columbia Metropolitan Police Department

Date:_____ By:_____
Chief of Police

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 717 14th Street NW, Suite 1150, Washington, D.C. 20005. Phone: 202-727-1822.

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

September 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-19 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of September 2009.

Marc L. Wilhite, Esq.
Pressler & Senftle, P.C.
927 15th Street, N.W.
12th Floor
Washington, D.C. 20005

FAX & U.S. MAIL

Mark Viehmeyer, Director
Metropolitan Police Department
300 Indiana Avenue, N.W.
Room 4126
Washington, D.C. 20001

FAX & U.S. MAIL

Chief Cathy Lanier
District of Columbia Police Department
300 Indiana Avenue, N.W.
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Shelley Hayes, Hearing Examiner
3020 Gentain Ct., N.E.
Washington, D.C. 20017

U.S. MAIL

Sheryl V. Harrington
Secretary