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

In the Matter of:)	
)	
)	
Fraternal Order of Police/Department of Corrections Labor Committee)	
)	
Complainant)	PERB Case No. 20-U-24
)	
v.)	Opinion No. 1807
)	
District of Columbia Department of Corrections)	
)	
Respondent)	
)	

DECISION AND ORDER

I. Statement of the Case

On April 6, 2020, the Fraternal Order of Police/Department of Corrections Labor Committee (FOP) filed an unfair labor practice complaint (Complaint) against the District of Columbia Department of Corrections (DOC).¹ FOP alleges that DOC violated D.C. Official Code § 1-617.04(a) (1) and (5) of the Comprehensive Merit Personnel Act (CMPA) through its actions in response to the coronavirus pandemic (COVID-19). The Agency filed an answer, arguing that FOP had failed to state a claim upon which relief could be granted by the Board under the CMPA.

For the reasons stated herein, the Complaint is dismissed.

¹ FOP also named Mayor Muriel Bowser and DOC Director Quincy Booth as Respondents in this matter. D.C. Official Code § 1-617.04 provides that the “District, its agents, and representatives” are prohibited from engaging in unfair labor practices. The Board has held that suits against District officials in their official capacity are treated as suits against the District. Therefore, the Board dismissed Mayor Bowser and Director Booth from this matter on April 24, 2020. *See FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at 4-5, PERB Case No. 08-U-19 (2011); *see also FOP/MPD Labor Comm. v. PERB*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

II. Background

On April 6, 2020, FOP filed its Complaint. On April 14, 2020, FOP filed a motion for preliminary relief. On April 24, 2020, in Opinion No. 1744,² the Board granted, in part, FOP's motion for preliminary relief and ordered DOC to bargain health and safety issues as well as impact and effects. In granting relief, the Board found that DOC had a duty to bargain health and safety issues and impact and effects, once the time for immediate decision-making had subsided.³ On May 8, 2020, DOC filed a motion for reconsideration of the Board's decision granting preliminary relief to FOP.⁴ On June 17, 2020, the Board issued Opinion No. 1748,⁵ denying DOC's motion for reconsideration.⁶

The matter was sent to a hearing examiner for fact-finding. On May 10 and June 21, 2021, a hearing was held. Prior to the issuance of the Hearing Examiner's report and recommendation, the D.C. Superior Court decided a similar case, *OLRCB v. PERB*.⁷ In its decision, the court determined that the COVID-19 Emergency Act "gives management the sole right to take any necessary personnel action in emergency situations," "notwithstanding" any contradictory provision of the CMPA.⁸

On October 25, 2021, the Hearing Examiner issued his Report and Recommendation (Report). The Hearing Examiner recommended that the Board dismiss the Complaint as a result of the Superior Court's broad interpretation of the COVID-19 Response Emergency Amendment Act of 2020 (COVID-19 Emergency Act).⁹ Based on the Superior Court's broad reading of the COVID-19 Emergency Act, the Hearing Examiner concluded that DOC was permitted to take the personnel actions it deemed necessary during the current COVID-19 emergency, notwithstanding any contradictory provision of the CMPA.¹⁰ The Hearing Examiner found that DOC was not required to bargain over its policies regarding health and safety during the COVID-19 emergency or the impact and effects of the pandemic-related transition to a 12-hour shift.¹¹ Accordingly, the Hearing Examiner recommended that the Board dismiss the Complaint and the Motion for Preliminary Relief.¹²

² *FOP/DOC Labor Comm. v. DOC*, 67 D.C. Reg. 8532, Slip Op. No. 1744, PERB Case No. 20-U-24 (2020).

³ Slip Op. No. 1744 at 8-9.

⁴ Amended Complaint at 19.

⁵ *FOP/DOC Labor Comm. v. DOC*, 67 D.C. Reg. 8542, Slip Op. No. 1748, PERB Case No. 20-U-24 (2020).

⁶ FOP amended its Complaint, incorporating into the Complaint its argument that DOC continued to commit unfair labor practices arising from DOC's failure to bargain in contravention of Opinion No. 1744.

⁷ Case No. 2020CA003086P(MPA) (D.C. Super. Ct. September 29, 2021).

⁸ *OLRCB v. PERB*, Case No. 2020CA003086P(MPA) at 8 (D.C. Super. Ct. September 29, 2021) (internal quotations omitted).

⁹ Report at 4-6 (citing COVID-19 RESPONSE EMERGENCY AMENDMENT ACT OF 2020, 2020 District of Columbia Laws Act 23-247).

¹⁰ See Report at 4-6.

¹¹ See Report at 6.

¹² Report at 6.

III. Discussion

In its Complaint, FOP claims DOC violated the CMPA by refusing to bargain health and safety issues arising from alleged unsafe and hazardous workplace conditions;¹³ eliminating official time for FOP representatives to engage in Union activities;¹⁴ and unilaterally changing the terms of employment to a 12-hour shift for employees.¹⁵ Additionally, FOP alleges that “DOC committed an unfair labor practice (ULP) by intentionally depriving the Union of Personal Protective Equipment (PPE) for use against COVID-19.”¹⁶

Relying on the Superior Court’s interpretation of the COVID-19 Emergency Act in conjunction with D.C. Official Code § 1-617.08(a)(6), the Hearing Examiner concluded that DOC did not have a duty to bargain even impact and effects of personnel actions DOC deemed necessary during the COVID-19 emergency.¹⁷ In its Exceptions, FOP argued that the Board should reject the Hearing Examiner’s recommendations, because the language of the COVID-19 Emergency Act is permissive, rather than mandatory.¹⁸ Thus, FOP asserted that the COVID-19 Emergency Act did not override PERB’s authority to decide whether DOC had a duty under the CMPA to conduct impact and effects bargaining.¹⁹

The Board finds FOP’s argument unpersuasive, as it is inconsistent with the Superior Court’s decision. In *OLRCB v. PERB*, the court took a broad view of management’s rights and found that management’s actions were not subject to bargaining, even over impact and effects.²⁰ Reading the court’s decision, the Board concludes that the court made the assumption, without going into a detailed explanation, that the COVID-19 Emergency Act broadly includes any actions that may be necessary. The court reasoned that the COVID-19 Emergency Act did not need to enumerate the specific actions management can take in an emergency because, under D.C. Official Code § 1-617.08(a)(6), management already has “flexible, expansive, open-ended authority to take ‘whatever actions may be necessary’ to address” the COVID-19 emergency.²¹ In addressing the “[n]otwithstanding any provision of [the CMPA]” clause of the COVID-19 Emergency Act, the court relied on the Court of Appeals “well-established principle that the use of such a notwithstanding clause clearly signals the drafter’s intention that the provisions of the notwithstanding section override conflicting provisions of any other section.”²² Therefore, pursuant to the court’s decision, the Board finds that the COVID-19 Emergency Act merely restates management’s pre-existing authority under D.C. Official Code § 1-617.08(a)(6) and applies that authority to the specific COVID-19 emergency.

¹³ Complaint at 2.

¹⁴ Complaint at 2-3.

¹⁵ Complaint at 3-4.

¹⁶ Complaint at 4. As noted earlier, the Complaint also incorporates the amendments FOP later filed.

¹⁷ Report at 6.

¹⁸ Exceptions at 2.

¹⁹ Exceptions at 2.

²⁰ *OLRCB v. PERB*, Case No. 2020 CA 003086 P(MPA) at 7-8 (D.C. Super. Ct. September 29, 2021).

²¹ *OLRCB v. PERB*, at 6-7.

²² *Id.* at 5 (quoting *Burton v. Office of Employee Appeals*, 30 A.3d 789, 796 (D.C. 2011)(internal quotations omitted).

The Board finds that the Hearing Examiner's findings and recommendation are reasonable, supported by the record, and consistent with the court's ruling. Therefore, the Board adopts the Hearing Examiner's conclusion that the Complaint should be dismissed in its entirety.

IV. Conclusion

The Board has reviewed and adopted the findings, conclusions, and recommendations of the Hearing Examiner, and finds that DOC had no duty to bargain over the personnel actions it deemed necessary to ensure an effective response to the COVID-19 emergency, even over impact and effects. As all of the Complainant's allegations are grounded in DOC's failure to bargain its response to the COVID-19 emergency, the Complaint is dismissed in its entirety. Last, in light of the Board's adoption of *OLRCB v. PERB*, the Board vacates Opinion Nos. 1744 and 1748.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed;
2. The Board's decisions in Opinion Nos. 1744 and 1748 are vacated; and
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Mary Anne Gibbons, Peter Winkler, and Renee Bowser.

February 17, 2022

Washington, D.C.