GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

Washington Teachers' Union, Local 6, Petitioner, v. District of Columbia Public Schools. Respondent.	PERB Case No. 92-U-13 Opinion No. 417

DECISION AND ORDER

This proceeding before the District of Columbia Public Employee Relations Board (Board) arises out of an Unfair Labor Practice Complaint and Amended Complaints filed, pursuant to D.C. Code Section 1-618.2(a) and (b)(2) of the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA) by the Washington Teachers' Union (WTU). The Complaint, filed May 29, 1992, alleges that Respondent District of Columbia Public Schools (DCPS) violated D.C. Code Sec. 1-618.4(a)(1) and (5) of the CMPA by failing to engage in good faith bargaining over its decision and/or the effects thereof to: close or restructure certain schools; lay off and transfer teachers represented by WTU; hire replacement teachers; ban smoking in school and administrative buildings, and improperly delegate the authority to conduct Step 2 grievances under the parties' collective bargaining agreement (Agreement).

On October 13, 1992, WTU filed an Amended Complaint alleging that DCPS further violated the CMPA by lengthening the number of instructional hours in the school day and eliminating planning periods without bargaining with WTU. A second Amended Complaint, filed in October 1993, alleged that DCPS violated the CMPA by unilaterally imposing a longer instructional day with no additional compensation and by unilaterally transferring teachers

from restructured schools. [1]/ In its Answer and Amended Answers, DCPS denied that its actions violated the CMPA.

By Notice dated June 9, 1994, the Board referred the matter to a Hearing Examiner. Hearings were held on June 17 and July 21 and July 27, 1994. [2]/ The Hearing Examiner's Report and Recommendation (a copy of which is appended to this Opinion) was submitted to the Board on January 12, 1995. [3]/

Report and Recommendations - The Hearing Examiner formulated the issues presented as follows: whether DCPS violated Section 1-618.4(a)(1) and (5) of the CMPA by failing to bargain in good

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[1]/ The second Amended Complaint alleged violations by the District of Columbia City Council and Mayor, as to which, see infra.

[2]/ There were numerous delays in the scheduling of the hearings, resulting from the parties' efforts to settle the issues and rescheduling requests by both parties. See Washington Teachers' Union v. District of Columbia Public Schools, ____ DCR ____, Slip Op. No. 396, PERB Case No. 92-U-13 (1994). In May 1994, before the hearings began, WTU filed a motion for a preliminary injunction ordering DCPS to rescind certain letters of transfer and cease and desist from procedures in connection with those transfers and future transfers, alleging that the involuntary transfers violated the terms of the parties' collective bargaining agreement. The Board ruled that the allegations of contract violation did not state an unfair labor practice claim under the CMPA, and denied the motion for lack of jurisdiction. See Op. No. 396, supra.

[3]/ The September 7, 1994 due date for post-hearing briefs was extended at the request of Curtis Lewis and Associates, who had become counsel for WTU following a change in Union leadership, and a second extension was granted at the request of both parties. See WTU v. DCPS, PERB Case No. 92-U-13, Op. No. 409 (January 10, 1995). DCPS' post-hearing brief was timely filed on October 25, 1994; WTU's new counsel did not file a brief, and did not request any further extension of time to do so. On November 8, 1994, the Board received a Motion to Intervene by four members of WTU for the purpose of filing a post-hearing brief prepared by WTU's prior counsel. The Board denied the Motion to Intervene, Op. No. 409, supra and directed the Hearing Examiner to issue his Report on the basis of the record before him. In denying the motion, the Board observed that if dissatisfied with the Hearing Examiner's Report, WTU had ample opportunity under Board Rules to file objections and a supporting brief.

faith over its decisions, and/or the effects thereof: (1) to lengthen the teacher instructional day and eliminate planning periods for teachers without providing additional compensation; (2) to involuntarily transfer teachers in connection with the closing and restructuring of Backus, Lincoln, Douglas and Roper Junior High Schools, and (3) to ban smoking in all school administrative buildings, and (4) by improperly delegating the authority to conduct Step 2 grievance hearings under the parties' then-effective Agreement.

The Hearing Examiner observed that the WTU's pre-hearing pleadings made broader allegations than the issues thus formulated, but that in the course of the hearings it offered no supporting proof (Hearing Examiners' Report and Recommendation (R&R) at 6). He accordingly recommended that allegations which varied from the issues as formulated above be dismissed for lack of proof (Id).

1. Workday, instructional periods and planning - The Hearing Examiner found that WTU "had negotiated and reached agreement regarding the subjects, of work day, instructional day and planning periods."[4]/ He concluded that the record did not support a finding that DCPS violated Section 1-618.4(a)(1) and (5) of the CMPA by failing to bargain in good faith with WTU over its decision on those matters and/or their effects (R&R at 11). [5]/

2. Closing/restructuring and teacher transfers - With respect to the decisions to close/restructure Backus, Lincoln, Douglas and Roper Junior High Schools and involuntarily transfer teachers assigned to those schools, the Hearing Examiner concluded that DCPS had exercised management rights over which it was not required to negotiate. He found that while DCPS was obligated to bargain on request as to the impact and implementation of those decisions, it had invited WTU to engage

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[4]/ The parties negotiated, but ultimately did not agree on lengthening the 8:30-3:30 work-day specified in the existing Agreement. In the fall of 1992, Article XXV.A.3 of the Agreement was amended to provide that teachers would be required to report to the classroom five minutes (instead of 15 minutes) before the class day began, and were required to remain in the classroom for 15 (rather than 30 minutes) after classes ended, thus enabling DCPS to extend the instructional day without changing the contractual work-day (R&R at 5).

[5]/ He observed that whether the changes in the instructional day violated the terms of the parties' Agreement "is a matter for another forum." (R&R at 11-12)

in impact bargaining; that WTU had failed to make any substantive proposals and thus had waived its rights to bargain, and that accordingly, DCPS' actions with respect to the closing/restructuring and teacher assignments did not violate the CMPA (R&R at 11-12).[6]/

3. Ban on Smoking - In denying that it was required to bargain over its decision to ban smoking throughout school and administrative buildings, DCPS asserted that it was required by law and regulation to adopt an all encompassing prohibition on smoking. The Hearing Examiner concluded that the cited laws and regulations did not support that DCPS contention. He further concluded that whether or not a total ban on smoking in the workplace is a mandatory subject of bargaining under the CMPA, "[h]aving permissively bargained over the issue" on a building by building basis, DCPS had "waived its right to act unilaterally in the area," and accordingly had violated Section 1-618.4(a)(1) and (5) of the CMPA by unilaterally issuing and implementing a total ban on smoking in school and administrative buildings (R&R at 12).

4. Designation of Hearing Officer for Step 2 Hearings - The Hearing Examiner found that WTU's complaint that DCPS had improperly changed the designation of a Step 2 Hearing Officer for grievances filed under the parties' collective bargaining agreement raised a dispute over a purely contractual matter over which this Board had no jurisdiction (R&R at 12).

Based on those findings and conclusions, the Hearing Examiner recommended dismissal of the allegations of the Complaint and Amended Complaints, except for the ban on smoking. With regard to the smoking directive, he recommended that the Board find that DCPS violated Section 1-618.4(a)(1) and (5), and that it be directed to cease and desist from applying the smoking ban and ordered to bargain in good faith over the ban and its effects (R&R at 13).

Parties' Exceptions - In referring to the period at the beginning of the work-day before commencement of the instructional day and the period between the end of the instructional day and the end of the work-day, the Hearing Examiner described those periods as "free time." In an exception timely filed pursuant to Board Rules, Section 520.13, WTU asserts that the Hearing Examiner's description is in error. It asserts,

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[6]/ The Hearing Examiner again noted that disputes as to whether DCPS' actions violated the Agreement are for determination pursuant to the contractual grievance/arbitration procedure (R&R at 12).

in a supporting affidavit, that those periods historically had been used by teachers for planning, class preparation and conferences (in addition to the periods during the day specifically designated as planning time), and that the 1992 changes in Article XXV.A.3 (see supra, note 4), had "not been intended to change the teachers non-instructional assignments....[or] provide for additional instructional time for students." WTU does not appear to except to the Hearing Examiners' finding and conclusion that "WTU and DCPS negotiated and reached agreement regarding the subjects of work day, instructional day and planning periods" (R&R at 10), but only to his use of the words "free time."[7]/ WTU reads those words as suggesting that DCPS can depart from prior practice and assign additional instructional or non-instructional duties during those periods, and asks that the "record be corrected to accurately reflect the true meaning and spirit of the Agreement at the time the 8:30 to 3:30 work-day was originally instituted." In adopting the Hearing Examiner's conclusions and recommendations in this matter (see infra), we read the words "free time" merely as a reference to the periods (in addition to scheduled lunch and planning periods) when teachers are not required to be present in the classroom, with no implication that DCPS can unilaterally change the existing practice with respect to the use of that time.[8]/

DCPS excepts to the Hearing Examiner's conclusion with respect to its ban on smoking "[t]hat having permissively bargained over the issue, DCPS waived its right to act unilaterally in the area," and accordingly violated the CMPA "by unilaterally implementing a no smoking directive without bargaining in good faith over its decision to impose and/or the effects of imposing the directive" (R&R at 12). In its Memorandum in support of its exceptions, DCPS argues that its right to ban smoking is "pursuant to law, specifically D.C. Law 8-262," and that its authority "to safeguard the health and safety of its students and administrative staff" is a right reserved to management under D.C. Code Section 1-618.8(a)(5). DCPS argues that the ban on teacher smoking is not a mandatory subject of bargaining because, while it does not concern educational policy, the benefit of the ban accrues to students and all persons in the building, and "outweighs the incidental impact on the teachers interests." In addition, DCPS denies that

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[7]/ The Hearing Examiner found that the periods in question (before and after the instructional day) were "typically used for preparation, grading papers, and similar tasks" (R&R at 4).

[8]/ That issue is not raised in this proceeding, and we express no opinion on the matter.

it had a past practice of negotiating over prohibiting smoking in all school premises, and asserts that it gave WTU an opportunity to negotiate over the effects of the no smoking directive and thus fulfilled its statutory obligation to bargain.

We agree with the Hearing Examiner that none of the statutes or regulations relied on by DCPS requires a total ban on smoking in school and administrative buildings. D.C. Law 3-22, District of Columbia Smoking Restriction Act of 1979, D.C. Code Section 6-911 et seq., prohibits smoking in any "educational facility owned or leased by any branch, agency or institutionality of the District of Columbia government" but, in defining "educational facility," excludes "faculty lounges and specific areas approved by the principal of a given school pursuant to guidelines established by the Superintendent." The areas excluded from the 1979 ban are precisely the areas affected by the no smoking directive, leaving open the question of whether a ban on smoking in such areas is a reserved management right or a mandatory subject of bargaining. The question is answered in the Smoking Regulation Act of 1990, which requires "[d]esignation of an area in the workplace where smoking may be permitted....", and further provides that "the designation of a smoking area in the workplace affects employment relations and shall be the subject of collective bargaining in accordance with ... [CMPA] Sec. 1-618.8(b)."

D.C. Code Section 6-913.2(a)(1) and (2)(b), D.C. Law 8-262, relied on by DCPS, which provides that the owner or person in charge of any workplace building may "prohibit...smoking throughout the building or in any part of the building over which she or he has control," was reenacted in the Smoking Regulation Amendment Act of 1990, D.C. Code Section 6-913(2)(c). We do not read that general provision, applicable to all workplace buildings within the District of Columbia, as preempting the immediately preceding provision, specifically identifying the designation of smoking areas as a mandatory subject of bargaining for agencies covered by the CMPA.

Thus, we agree with the Hearing Examiner that DCPS violated Section 1-618.8(b) of the CMPA by its unilateral decision to impose a total ban on smoking. We do not, however, adopt his conclusion that whether or not the matter is a mandatory subject of bargaining, by "permissive" bargaining in the past, DCPS had waived any rights to act unilaterally (R&R at 12). [9]/ While

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[9]/ The National Labor Relations Board has held, under the NLRA, that a party that has engaged in permissive bargaining does not waive its right to refuse to do so, at any time before

(continued...)

the record supports DCPS' contention that it invited WTU to bargain over the effects and implementation of the no smoking directive, we conclude that the invitation could not satisfy DCPS' bargaining obligations. DCPS was required to bargain over its decision to ban all smoking, and meaningful bargaining over effects could not take place in the context of a decision already unilaterally made. We adopt the Hearing Examiner's conclusion that DCPS violated the CMPA by its decision to ban smoking without bargaining in good faith over the decision and its effects, and his recommendation that DCPS be directed to do so, although, as discussed above, we do not adopt the conclusion that underlay his recommendation.

With respect to all other findings, conclusions and recommendations, we find the Hearing Examiner's analysis and reasoning to be thorough and persuasive. We therefore adopt them in their entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The D.C. Public Schools (DCPS) shall cease and desist from refusing to bargain in good faith with the Washington Teachers' Union, Local 6 (WTU) with respect to its no smoking directive.

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[9](...continued)
reaching agreement, or after reaching agreement, in subsequent negotiations, See e.g., Kit Mfg. Co., 150 NLRB 662, enforced, 365 F.2d 829 (CA 9 1969); NLRB v. Davidson, 318 F.2d 550 (CA 4 1963) and Chemical Workers v. Pittsburgh Plate Glass Co. 404 US 157 (1971).

This Board has not yet determined whether the somewhat different language of the CMPA provides for "permissive" as well as "mandatory" subjects of bargaining. In light of our ruling that DCPS is *required* to bargain over its no smoking ban, the issue is not presented here. However, we have concluded that the question frequently arises in and shapes negotiations under the CMPA, and can best be resolved by this Board after consideration of a broader spectrum of views than those available in the normal time-sensitive adjudicative process. Accordingly, in the near future, the Board will invite the submission of comments and supporting arguments by all interested parties.

2. DCPS shall cease and desist from unilaterally applying its no smoking directive in violation of D.C. Code Section 1-618.4(a)(5) and (1) without first bargaining in good faith with WTU, the exclusive bargaining representative of bargaining unit employees.

3. DCPS shall cease and desist from interfering, in any like and related manner, with the rights guaranteed employees by the Comprehensive Merit Personnel Act.

4. The Complaint and Amended Complaints are otherwise dismissed in their entirety.

5. DCPS shall post copies of the attached Notice conspicuously at all of the affected work sites for thirty (30) consecutive days.

6. DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of the date of this Order that the information referred to in this Order has been provided to WTU and that the Notices have been posted accordingly.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 17, 1995