

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

In the Matter of:)	
)	
American Federation of State, County and Municipal Employees, District Council 20 and Local 2091)	
)	
Complainant)	PERB Case No. 14-U-03
)	
v.)	Opinion No. 1514
)	
Department of Public Works)	
)	
Respondent)	

DECISION AND ORDER

I. Statement of the Case

On December 19, 2013, the American Federation of State, County and Municipal Employees, District Council 20 and Local 2091 (“Union” or “AFSCME”) filed an Unfair Labor Practice Complaint (“Complaint”) against D.C. Department of Public Works (“Agency” or “DPW”), alleging that DPW had violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a production quota for employees. DPW filed an Answer, denying the allegations in AFSCME’s Complaint and raising affirmative defenses. In Opinion No. 1450, the Board ordered an unfair labor practice hearing in the above-captioned matter.¹ For the following reasons, the Board dismisses the Complaint against DPW.

II. Hearing Examiner’s Report and Recommendation

A. Background

This case involves Solid Waste Inspectors (“Inspectors”) in the SWEEP² department of DPW. As part of the Inspectors’ job duties, Inspectors issue either warnings or notices of violations (“NOV”) when an Inspector finds a violation of the District’s sanitation regulations.³ In

¹ *AFSCME, District Council 20 and Local 2091 v. Dept. of Public Works*, 61 D.C. Reg. 1561, Slip Op. No. 1450, PERB Case No. 14-U-03 (2014).

² Solid Waste Education and Enforcement Program.

³ HERR at 4.

2007, the D.C. Department of Human Resources mandated that DPW develop performance goals for its Inspectors.⁴ In 2009, DPW hired a consulting firm to assist DPW develop productivity standards.⁵ DPW and several union leaders subsequently discussed recommendations for performance goals with DPW's consultant.⁶

In March 2012, Sybil Hammond and Hallie Clemm, managers at DPW's Solid Waste Administration, gave Andre Lee, an AFSCME representative, a revised version of the Performance Evaluation and "invited AFSCME's comments."⁷ Several Union members made handwritten comments on the document from DPW. This document was returned to DPW management in July. After three weeks, Lee learned that DPW had rejected AFSCME's proposed revisions.⁸ On December 19, 2013, the Union filed its ULP Complaint, alleging that DPW violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a performance system of NOV quotas.⁹

B. Hearing Examiner's Conclusions

Before the Hearing Examiner, the parties disputed whether the rate of NOVs issued per Inspector was a performance goal or a performance quota. The Hearing Examiner found that the system DPW used for measuring performance in relation to the number of NOVs issued per Inspector were performance goals and not a quota.¹⁰ The Hearing Examiner next concluded that DPW did not commit an unfair labor practice when it established production goals for the number of NOVs issued per Inspector, because it was within DPW's management rights under the D.C. Official Code § 1-617.08(a), regarding DPW's efficiency of service and determining the mission of the agency.¹¹

Based on the determination that the performance evaluations were not subject to mandatory bargaining, the Hearing Examiner evaluated whether DPW had a duty to engage in impact and effects bargaining with the Union. The Hearing Examiner found that DPW did not have a duty to engage in impact and effects bargaining, because the Union did not make an "unambiguous request to bargain impact and effects of the productivity goals...."¹²

The Hearing Examiner also found that the Union failed to establish a past practice for which DPW needed to bargain prior to implementation.¹³ The Union contended that Inspectors were not required to issue a minimum number of NOVs and that DPW's past practice was to allow Inspectors to determine the number of NOVs to be issued. The Union argued that this past practice became a term and condition of the Inspectors' employment, which required DPW to bargain over

⁴ *Id.* at 5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ HERR at 1.

¹⁰ *Id.* at 9.

¹¹ *Id.* at 12.

¹² *Id.*

¹³ *Id.* at 14-15.

prior to implementation.¹⁴ The Hearing Examiner rejected the Union's argument, finding that the Union could not provide sufficient evidence to establish a past practice.¹⁵

The Hearing Examiner concluded that the Complaint should be dismissed.

III. Discussion

In the Complaint, the Union alleged "DPW did not bargain with the Union before unilaterally imposing a production quota on the issuance of NOVs."¹⁶ In addition, the Union asserted that "[t]he implementation of a production quota such as a minimum number of daily or monthly NOV issuances is a mandatory subject of bargaining."¹⁷ Further, the Union alleged that DPW had a past practice of "not imposing a minimum number of NOV issuances and of emphasizing community education over fines to the community and issuing warnings rather than NOVs."¹⁸

A. Performance evaluations' negotiability

The Union filed Exceptions to the Hearing Examiner's finding that the Union had failed to establish that the Agency had a past practice allowing the Inspectors to determine the number of NOVs that they issued.¹⁹ Further, the Union challenged the Hearing Examiner's findings and conclusions that DPW instituted a production "goal" in its performance evaluation system of the Inspectors, and not a "quota." The Union argued that the institution of a "quota" was a mandatory subject of bargaining.²⁰

The Board declines to determine whether the NOV issuance rate per Inspector was a quota or goal, as the distinction does not disturb the fact that the NOVs issued per Inspector was a part of DPW's performance management system, which is a non-negotiable management right. D.C. Official Code § 1-613.53(b) states, "Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a non-negotiable subject for collective bargaining."²¹ As the performance evaluation system was not a mandatory subject of bargaining, DPW did not have a duty to bargain before implementation of the system.²² Further, as the statute makes the issuance rate of NOVs non-negotiable, the statute precludes consideration of a past practice related to performance evaluations. The Board has held that a duty to bargain over a unilateral change in a past practice is

¹⁴ HERR at 14-15.

¹⁵ *Id.* at 15.

¹⁶ Complaint at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 3.

¹⁹ AFSCME's Exceptions at 15-16.

²⁰ *Id.* at 5.

²¹ See *American Federation of Government Employees, Local 631, and Department of Public Works*, 59 D.C. Reg. 15175, Slip Op. No. 1334, PERB Case No. 09-U-18 (2012).

²² As the Hearing Examiner did not discuss D.C. statutory law or PERB precedent on the matter, the Board declines to address the Hearing Examiner's analysis of this issue.

limited by statutory rights.²³ Even if the Board were to reject the Hearing Examiner's factual-finding that there was no past practice, the Union's Exceptions would fail. The Board finds that DPW did not violate the CMPA by failing to bargain with the Union over the performance evaluation system for SWEEP Inspectors prior to its implementation.

B. Impact and effects bargaining

Notwithstanding the non-negotiability of a management right, management violates its statutory duty to bargain when it implements a management decision in the face of a timely union request to bargain over impact and effects.²⁴ In prior cases, the Board has held that "although the implementation of a performance evaluation system is a non-negotiable subject of collective bargaining, an agency is obligated to bargain in good faith over the adverse impact a performance evaluation may have on the terms and conditions of an employee's employment."²⁵

Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain.²⁶ Absent a request to bargain concerning the impact and effects of the exercise of a management right, an employer does not violate D.C. Code § 1-617.04(a)(1) and (5) by unilaterally implementing a management right under the CMPA.²⁷ Furthermore, an unfair labor practice has not been committed until there has been a general request to bargain and a "blanket" refusal to bargain.²⁸

The Hearing Examiner found that DPW did not violate its duty to engage in impact and effects bargaining, because "PERB precedent requires a clear and timely demand to bargain impact and effects issues" is incorrect.²⁹ The Hearing Examiner's conclusion that a timely request for impact and effects bargaining must be "clear" is not established in Board precedent.³⁰

²³ *District Council 20, American Federation of State, County, and Municipal Employees, Locals 1200, 2776, 2401 and 2087 v. District of Columbia Government, et. al.*, 46 D.C. Reg. 6513, Slip Op. No. 590 at p. 9, PERB Case No. 97-U-15 A (1999). See also, *American Federation of Government Employees, Local 631, and Department of Public Works*, 59 D.C. Reg. 15175, Slip Op. No. 1334, PERB Case No. 09-U-18 (2012).

²⁴ See *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 D.C. Reg. 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002); *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994).

²⁵ See *American Federation of Government Employees, Local 631, and Department of Public Works*, 59 D.C. Reg. 15175, Slip Op. No. 1334, PERB Case No. 09-U-18 (2012) (citations omitted).

²⁶ *D.C. Nurses Association v. Department of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012); *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982).

²⁷ *Fraternal Order of Police v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 5427, Slip Op. No. 984, PERB Case No. 08-U-09 (2012) (quoting *American Federation of Government Employees, Local Union No. 383, AFL-CIO v. District of Columbia Department of Human Services*, 49 D.C. Reg. 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002)).

²⁸ *FOP v. Department of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002); *International Brotherhood of Police Officers v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992).

²⁹ See *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992).

³⁰ *Id.*

In its Exceptions, the Union disputed the Hearing Examiner's findings and argued that it requested impact and effects bargaining in July 2012, and that the Union learned three weeks after its request that it was denied.³¹ If the Board was to accept the Union's factual assertion as to when it requested impact and effects bargaining and it was denied, the Board must dismiss the Complaint as untimely.

After reviewing the record and the Union's factual assertions regarding impact and effects bargaining, the Board finds that the Union's unfair labor practice allegation with respect to DPW's duty to engage in impact and effects bargaining is untimely. The Union asserts that DPW refused to bargain in July 2012 or August 2012. The Complaint was filed in December 2013. Board Rule 520.4 provides: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." The Board has held that Rule 520.4 is jurisdictional and mandatory.³² The Board does not have discretion to extend the deadline for initiating an action.³³ Therefore, the Board dismisses the Union's allegation that the Agency failed to engage in impact and effects bargaining as untimely.

IV. Conclusion

To the extent discussed above, the Board rejects the reasoning in the Hearing Examiner's Report and Recommendation but reaches the same conclusion. The Board finds that the number of NOV's issued by an individual Solid Waste Inspector was a part of DPW's performance evaluation system and, therefore, a non-negotiable management right. In addition, the Board finds that AFSCME's allegation that DPW failed to engage in impact and effects bargaining was untimely filed. Therefore, the Board dismisses the Complaint.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFSCME's Unfair Labor Practice Complaint is dismissed with prejudice.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, Member Keith Washington, and Member Donald Wasserman

Washington, D.C.

March 19, 2015

³¹ Union Exceptions at 9.

³² *Hoggard v. D.C. Public Schools and AFSCME Council 20, Local 1959*, 43 D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993), *aff'd sub nom.*, *Hoggard v. Public Employee Relations Board*, MPA-93-33 (D.C. Super. Ct. 1994), *aff'd*, 655 A.2d 320 (D.C. 1995); *see also Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991).

³³ *Hoggard*, Slip Op. No. 352.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-U-03 was transmitted to the following parties on this the 25th day of March, 2015.

Brenda C. Zwack, Esq.
Murphy Anderson PLLC
1701 K Street, NW, Suite 210
Washington, D.C. 20006

VIA FILE & SERVEXPRESS

Andrew Gerst, Esq.
D.C. Office of Labor Relations and
Collective Bargaining
441 4th Street, NW, Suite 820 North
Washington, D.C. 20001

VIA FILE & SERVEXPRESS

/s/Erica J. Balkum
Erica J. Balkum, Esq.
Attorney-Advisor
Public Employee Relations Board
1100 4th Street, SW
Suite E630
Washington, D.C. 20024