

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, Local 2401, AFL-CIO,)	PERB Case No. 10-U-37
)	
Complainant,)	Opinion No. 1463
)	
v.)	Decision and Order
)	
District of Columbia)	
Child and Family Services Agency,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO (“AFSCME” or “Union”), filed an Unfair Labor Practice Complaint against the District of Columbia Child and Family Services Agency (“CFSA” or “Agency”), alleging CFSA interfered with, restrained and coerced employees in violation of D.C. Official Code § 1-617.04(a)(1) and discriminated against and refused to bargain in good faith with the Union in violation of D.C. Official Code § 1-617.04(a)(1) and (5) (Hearing Examiner’s Report, at 1).

Specifically, AFSCME alleged CFSA violated the CMPA when it: 1) failed to respond to several parts of an information request; 2) declared in bad faith that AFSCME’s final proposal during impact and effects (“I&E”) bargaining was nonnegotiable, which forced the Union to file a negotiability appeal¹ and initiate impasse proceedings²; and 3) engaged in direct dealing with members of the bargaining unit.³ *Id.*, at 15, 19.

¹ PERB Case No. 10-N-03.

CFSA denied the allegations. (Answer). On January 25, 2013, a hearing was held, and on July 17, 2013, the Hearing Examiner issued his Report and Recommendations (“Hearing Examiner’s Report”), which recommended that the Complaint be dismissed with prejudice. (Hearing Examiner’s Report, at 22).

On August 2, 2013, AFSCME filed Exceptions to the Hearing Examiner’s Report. (Exceptions). The Hearing Examiner’s Report and AFSCME’s Exceptions are before the Board for consideration.

II. Background

On May 6, 2010, CFSA notified AFSCME that it would terminate the employment of more than 100 employees (including 57 Social Service Assistants (“SSAs”) that were represented by AFSCME) via a Reduction-in-Force (“RIF”) on June 11, 2010, and that it would then create 35 positions with the new job title, Family Support Worker (“FSW”). (Hearing Examiner’s Report, at 3). The new FSW positions required a Bachelor’s degree whereas the previous SSA positions did not. *Id.* The parties met three (3) times in May 2010 to bargain the impact and effects of the RIF and the creation of the new positions. *Id.*

A. Information Request

After the second I&E bargaining meeting, AFSCME emailed an information request to CFSA seeking:

- 1) Copies of all letters sent to employees, by certified mail or otherwise, on or after May 6, 2010;
- 2) A description of the process by which CFSA will contact rified employees if further vacancies arise over the course of the next two years;
- 3) Copies of all supervisors’ transitional plans, such as staffing plans regarding covering workload; [and]
- 4) Citations to the regulations CFSA contends support the need to require employees to hold a Bachelor’s degree, or otherwise condition federal funding or reimbursement on employees having a BA/BS degree.

Id., at 3-4 (internal citations omitted).

² PERB Case No. 10-I-06.

³ The Complaint originally alleged that CFSA also discriminated against bargaining unit employees, but AFSCME withdrew that allegation at the hearing. (Hearing Examiner’s Report, at 2).

In the Complaint, AFSCME alleged CFSA committed an unfair labor practice by not providing all of the requested information. *Id.*, at 4. Based on witness testimony and other evidence, the Hearing Examiner found that CFSA provided all of the information related to AFSCME's request for "[c]opies of all letters sent to employees, by certified mail or otherwise, on or after May 6, 2010." *Id.*, at 17.

AFSCME asserted that CFSA failed to provide descriptions of the processes that CFSA would use to contact the RIF'd employees about vacancies as requested. The Hearing Examiner noted that AFSCME's only witness, Stephen White, testified that AFSCME never received this information, but that CFSA's witness, Dexter Starkes, testified the information was provided at one of the I&E bargaining sessions, and that as of the date of the hearing, 17 RIF'd employees had been rehired as a result of the process established and described by the Agency. *Id.*, at 6, 17-18. The Hearing Examiner found that "Starkes testimony was more forthright and his demeanor more credible on this issue" and that, as a result, "the record establishes that CFSA responded to AFSCME's information request for 'a description of the process by which CFSA will contact rified employees if further vacancies arise....'" *Id.*, at 18.

The Hearing Examiner likewise found that "the un rebutted testimony of Debra Porchia-Usher established that, all the transitional plans that CFSA had, were given to AFSCME." *Id.* For this reason, and others, the Hearing Examiner found "the record establishes that CFSA responded to AFSCME's request for 'all supervisors' transitional plans, such as staffing plans regarding covering workload.'" *Id.*

Addressing AFSCME's request for regulatory authority supporting the Bachelor's degree requirement, the Hearing Examiner noted that Dean AQUI, an attorney with the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB"), informed AFSCME that the Agency mistakenly claimed that such a regulation existed, but that the Agency still intended to keep the degree requirement for the new FSWs. *Id.* Based on this evidence, the Hearing Examiner found that "AFSCME's assertion that CFSA [had] not responded to [this part of] AFSCME's information request [was] without merit." *Id.*

AFSCME did not except to any of the Hearing Examiner's findings regarding the information request.

B. Negotiability

During I&E bargaining, AFSCME proposed that the CFSA rehire the displaced SSA workers into the newly created FSW positions on the condition that the rehired workers obtain a Bachelor's degree at a later date. (Hearing Examiner's Report, at 4). CFSA counter-proposed that the displaced SSA employees be hired into FSW positions contingent upon those employees obtaining a Bachelor's degree within six (6) months. *Id.* AFSCME counter-proposed that the employees be given four (4) years to obtain the degree, to which CFSA proposed that the employees be given until the end of the calendar year (approximately seven (7) months). *Id.*, at 4-5. Finally, AFSCME proposed that the employees be given seven (7) semesters (or

approximately three and a half (3.5) years) to obtain the degree. *Id.*, at 5. CFSA rejected AFSCME's final proposal and stated it was unwilling to deviate from its final proposal to give employees until the end of the calendar year to obtain the degree. *Id.* On May 27, 2010, AFSCME filed with the Public Employee Relations Board ("PERB") a Declaration of Impasse and Request for Impasse Resolution. *Id.*; and PERB Case No. 10-I-06.

On June 10, 2010, CFSA, through its representative at OLRCB, notified AFSCME that AFSCME's proposal to give the employees three and a half (3.5) years to obtain a Bachelor's degree constituted an "extensive delay of a management right" that was "equal to nullifying [that] right" and was therefore nonnegotiable. *Id.* On June 11, 2010, AFSCME filed with PERB a negotiability appeal challenging CFSA's declaration that AFSCME's final proposal was nonnegotiable. *Id.*; and PERB Case No. 10-N-03.

The Hearing Examiner summarized AFSCME's positions in this ULP case as: 1) "CFSA's declaration that the Union's final proposal was nonnegotiable was a baseless tactic which forced AFSCME to file a negotiability appeal after initiating impasse proceedings"; and 2) issuing the declaration constituted "bad faith bargaining under the CMPA." *Id.*, at 19. The Hearing Examiner noted that AFSCME did not present any testimony or evidence at the Hearing to support these allegations. *Id.*

CFSA conceded that it was obligated to engage in I&E bargaining, but argued that AFSCME's specific proposals were nonnegotiable because they would have created an extended delay that would have prevented CFSA from conducting the RIF of the SSAs and/or filling the new FSW positions. *Id.*, at 20.

Based on the parties' arguments and AFSCME's failure to present any testimony or evidence at the Hearing to support its allegation, the Hearing Examiner found that he could not conclude that CFSA's reasoning for the declaration was "baseless", or that the declaration itself was made in bad faith in violation of the CMPA. *Id.*, at 19-20. *Id.*, at 20. The Hearing Examiner noted that "there is no evidence of bad faith on CFSA's part during bargaining." *Id.*, at 20. Furthermore, the Hearing Examiner stated he could not analyze the substance of whether AFSCME's proposal was negotiable because that duty lies exclusively with PERB as per PERB Rule 532.4, and because the question of negotiability was outside of his authority on grounds that he was only assigned to resolve the ULP case. *Id.* The Hearing Examiner noted that the ULP case record nevertheless "establishes that AFSCME has not advanced its negotiability appeal [in PERB Case No. 10-N-03] or sought resolution of the negotiability dispute through a PERB determination regarding AFSCME's proposal." *Id.* For these reasons, the Hearing Examiner recommended that PERB dismiss AFSCME's allegation that CFSA acted in bad faith by declaring AFSCME's proposal nonnegotiable. *Id.*

AFSCME excepts to three (3) of the Hearing Examiner's findings. (Exceptions, at 1).

First, AFSCME excepts to the Hearing Examiner's finding that he was not authorized to determine whether AFSCME's proposal was negotiable. *Id.*, at 2. AFSCME argues PERB precedent empowers hearing examiners in ULP proceedings to resolve questions of negotiability

when necessary. *Id.* (citing *Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 D.C. Reg. 96, Slip Op. No. 249 at p. 5 n. 4, PERB Case No.89-U-17 (1990)⁴). AFSCME contends the Hearing Examiner should have resolved the negotiability question in AFSCME's favor because its specific proposal was "similar to proposals addressing wages and bonuses to be paid to employees whose positions are slated to be abolished...[which] PERB has held...are negotiable in the context of impact and effects bargaining." *Id.*, at 5 (citing *Unions in Compensation Unions 20, i.e., AFSCME, NUHHCHE, Local 1033, and SEIU, District 1199E-DC v. District of Columbia Department of Health*, 50 D.C. Reg. 6801, Slip Op. No. 715, PERB Case No. 02-N-01 (2003)⁵; and *Unions in Compensation Unions 21, i.e., AFSCME Local 2097 and IBPO Local 446, v. District of Columbia Department of Health*, 49 D.C. Reg. 7756, Slip Op. No. 674, PERB Case No. 02-N-02 (2002)⁶). AFSCME further argues its proposal was negotiable because it addressed the implementation of the RIF, not the decision to conduct the RIF itself. *Id.*, at 6. By declaring AFSCME's proposal to be nonnegotiable, AFSCME claims CFSA took the position that AFSCME had no right to make the proposal in the first place. *Id.* AFSCME asserts, however, the reasonableness of the proposal's merits was "irrelevant" to the question of "whether [AFSCME] had the right to make the proposal and to bargain over the implementation of the new job requirement." *Id.* AFSCME avers it had every right to engage in I&E bargaining over CFSA's decision, and that any issues about the reasonableness of its proposal would have been resolved during arbitration through PERB Case No. 10-I-06. *Id.* AFSCME further argues that the Hearing Examiner erred when he failed to address whether CFSA waived its right to declare AFSCME's proposal nonnegotiable by making "substantially similar (though quantitatively different)" counterproposals during I&E bargaining; and whether CFSA acted in bad faith by first engaging in negotiations and then declaring the issue to be nonnegotiable. *Id.*

In its Opposition to Exceptions, CFSA argues the Hearing Examiner's lack of authority to determine whether AFSCME's proposal was or was not negotiable "was only one of the reasons he gave for rejecting the Union's arguments." (Opposition to Exceptions, at 3). CFSA notes the Hearing Examiner also reasoned that: 1) based on CFSA's argument that AFSCME's proposal would cause an extended delay and prevent CFSA from being able to conduct the RIF and fill the new FSW positions, he could not conclude that CFSA's declaration was "baseless" or made in bad faith; and 2) AFSCME had not done anything to advance the process in PERB Case No. 10-N-03, in which the question of whether the proposal was negotiable would be resolved. *Id.* Further, CFSA contends it complied with all of PERB's rules and precedents governing

⁴ Footnote 4 in the case states: "We similarly reject [the respondent agency's] contention that the only way to raise issues concerning the negotiability of a subject matter is through a negotiability appeal. Such determinations may also be made in unfair labor practice proceedings as is the case herein."

⁵ Holding that proposals concerning wages and bonuses and severance pay for employees affected by a RIF are negotiable.

⁶ Holding that "absent language removing a matter from the scope of all matters otherwise negotiable under the CMPA, the [unions'] proposals concerning wages and bonuses and severance pay for employees affected by a RIF]...are negotiable." *See* p. 7.

declarations of nonnegotiability and therefore cannot have acted in bad faith by simply availing itself of the right to do so. *Id.*, at 3-4.

Second, AFSCME excepts to the Hearing Examiner's finding that "there is no evidence [on the record] of bad faith on CFSA's part during bargaining." (Exceptions, at 1). AFSCME contends CFSA's admitted implementation of the RIF after AFSCME initiated impasse proceedings while the case was still pending constitutes bad faith in violation of the *status quo* provision in D.C. Official Code § 1-617.17(f)(4)⁷ *Id.*, at 7-8 (citing *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 46 D.C. Reg. 7228, Slip Op. No. 485, PERB Case No. 96-U-14 (1996)⁸). AFSCME then again argues the Hearing Examiner erred by failing to address whether CFSA acted in bad faith when it engaged in I&E bargaining, exchanged proposals, and then reversed its initial position by declaring the matter nonnegotiable. *Id.*, at 8.

CFSA contends AFSCME's reliance on D.C. Official Code § 1-617.17(f)(4) is misplaced because that provision, as well as the applicability of the case AFSCME cited, are limited to compensation negotiations, which D.C. Official Code § 1-617.17(b) defines as bargaining with respect to "... salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours, and any other compensation matters." (Opposition to Exceptions, at 5). CFSA argues that management's right to determine job qualifications is not a compensation matter and is therefore not subject to the *status quo* provision in D.C. Official Code § 1-617.17(f)(4). *Id.* As a result, CFSA avers it did not act in bad faith by conducting the RIF and creating and filling the new FSW positions. *Id.*, at 5-6.

Third, AFSCME excepts to the Hearing Examiner's statement that "[t]he case record establishes that AFSCME has not advanced its negotiability appeal [PERB Case No. 10-N-03] or sought resolution of the negotiability dispute through a PERB determination regarding AFSCME's proposal." (Exceptions, at 9) (quoting Hearing Examiner's Report, at 20). AFSCME excepts to this statement for the reasons that: 1) "PERB Case 10-N-03 is not and was not before the Hearing Examiner and it was inappropriate for him to go outside the record in the case before him by examining other case files to support his determination in this matter"; and 2) it was prejudicial for the Hearing Examiner to review the record in 10-N-03 without also reviewing the record of 10-I-06; and 3) according to PERB Rule 532 *et seq.*, it is up to PERB to advance the process of 10-N-03, not AFSCME. *Id.*, at 9-10.

⁷ D.C. Official Code § 1-617.17(f)(4): "If the procedures set forth in paragraph (1), (2), (3), or (3A) of this subsection [governing 'collective bargaining concerning compensation'] are implemented, no change in the *status quo* shall be made pending completion of mediation and arbitration, or both."

⁸ Holding that, in accordance with D.C. Official Code § 1-617.17(f)(4), it is a violation of the duty to bargain in good faith and therefore an unfair labor practice for an agency to, without legal justification, change the *status quo* in the compensation of bargaining unit employees while engaged in the bargaining of a new compensation agreement, or while compensation negotiations are at an impasse, or until the completion of the mediation or arbitration of the compensation issues that are at an impasse. *See* p. 6.

CFSA contends the Hearing Examiner appropriately considered PERB Case No. 10-N-03 in his analysis of the instant ULP case in light of the fact that AFSCME's reference to PERB Case No. 10-N-03 in paragraph 24 of its ULP Complaint made it part of the instant ULP case's record. (Opposition to Exceptions, at 6). Further, CFSA argues that nothing prevented AFSCME from inquiring why PERB had not yet addressed that case when this matter was scheduled for a hearing. *Id.*

C. Bypass and Direct Dealing

AFSCME alleged that on June 7, 2010, Roque Gerald, CFSA's Director, sent an email to all CFSA staff stating that CFSA had already hired 17 people into the FSW positions and that it would hire approximately 18 more in the next 30 days. (Hearing Examiner's Report, at 20-21). AFSCME contended that by so doing, CFSA violated the CMPA by interfering with, restraining, and coercing employees in the exercise of their rights under D.C. Official Code § 1-617.06(a)(1) and by refusing to bargain in good faith as required by D.C. Official Code §§ 1-617.04(a)(1) and (5). *Id.* The Hearing Examiner noted that while AFSCME quoted some of the email's text in its Complaint, it never introduced the actual email into evidence at the Hearing other than to briefly reference it in its opening statement and in its post-hearing brief. *Id.*, at 21. AFSCME's only witness, Mr. White, did not testify about the email. *Id.*, at 21. Further, the Hearing Examiner noted that AFSCME's Complaint asks that CFSA be ordered to "[c]ease and desist from dealing directly with employees represented by the Union with regard to wages, hours, or other terms and conditions of employment", yet the request was not expressly linked to AFSCME's allegation regarding the email. *Id.* (quoting Complaint, at 6). The Hearing Examiner found that because AFSCME "did not introduce evidence, testimony or supporting arguments supporting the allegation in its Complaint that CFSA sought to bypass the Union or deal directly with bargaining unit employees with the Gerald email", the allegation was deemed "abandoned and waived." *Id.*, at 21-22.

Notwithstanding, the Hearing Examiner reasoned that even if AFSCME's allegation had been supported by evidence at the hearing, "a fair reading" of Gerald's email reveals that it was simply CFSA communicating with its staff about the 17 new FSWs it had hired, the additional FSWs it wanted to hire, CFSA's then upcoming fiscal year budget, and another unrelated matter dealing with Court supervision. *Id.*, at 22. Therefore, the email did not, by itself, constitute a violation of the CMPA. *Id.* Further, the Hearing Examiner found there was nothing in the email that "manifests an effort by CFSA to deal directly with bargaining unit employees, or disparage or undermine AFSCME as the bargaining unit employee's exclusive representative." *Id.* (citing *American Federation of State, County and Municipal Employees, District Council 20, et al. v. Government of the District of Columbia, et al.*, 36 D.C. Reg. 427, Slip Op. No. 200, PERB Case No. 88-U-32 (1988)). Consequently, the Hearing Examiner found that AFSCME's direct dealing and bypass allegation was without merit and recommended it be dismissed with prejudice. *Id.*

AFSCME did not except to any of the Hearing Examiner's findings regarding the email. (Exceptions).

III. Discussion

The Board will affirm a Hearing Examiner's findings if the findings are reasonable, supported by the record, and consistent with Board precedent. *See American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003). Determinations concerning the admissibility, relevance, and weight of evidence are reserved to the Hearing Examiner. *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496 at 3, PERB Case No. 95-U-20 (1996). Issues concerning the probative value of evidence are reserved to the Hearing Examiner. *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07 (1998). Mere disagreements with a Hearing Examiner's findings and/or challenging the Examiner's findings with competing evidence do not constitute proper exceptions if the record contains evidence supporting the Hearing Examiner's conclusions. *Hoggard v. DCPS, supra*, Slip Op. No. 496 at 3, PERB Case No. 95-U-20.

A. Information Request

In the instant matter, the Board holds that the Hearing Examiner's finding that CFSA complied with AFSCME's information request is reasonable, supported by the record, and consistent with Board precedent. *AFGE v. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12. In regard to AFSCME's request for all of the correspondence CFSA sent to its employees on or after May 6, 2010, witness testimony as well as Union Exhibit 2 and Agency Exhibit 3 show that CFSA complied with the request when Mr. Starkes sent the requested information to Mr. White on May 12, 2010. (Hearing Transcript, at 23-24, 36). Concerning AFSCME's request for a description of the process CFSA would use to contact RIF'd employees about vacancies, Mr. Starkes testified that he shared CFSA's plan at the May 19, 2010, bargaining session and further testified that 17 RIF'd SSAs had been rehired as FSWs because of that process. *Id.*, at 35-36. Addressing AFSCME's request for legal authority demonstrating the necessity for FSW's to hold a Bachelor's degree, Union Exhibit 2 shows that Mr. Aquino responded to the request on June 10, 2012, stating that CFSA's former assertion that such authority existed "appears to have been an error." In regard to AFSCME's request for CFSA's transitional plans, Mr. White testified he did not remember receiving the information, but Debra Porchia-Usher, who testified for CFSA, testified that on May 26, 2010, CFSA sent AFSCME the information in two (2) documents: the first dated May 24, 2010, titled Congregate Care Contract Management Division Transition Plan Update; and the second dated May 24, 2010, titled Child and Family Services Agency Programs Transition Plan Summary and Update. (Hearing Transcript, at 23, 30). Ms. Porchia-Usher testified that no other plans had been developed beyond those two (2) reports. *Id.*, at 31.

The Hearing Examiner correctly noted that Mr. White's testimony sometimes conflicted with that of Mr. Starkes. (Hearing Examiner's Report, at 18). The Hearing Examiner credited "Starkes' testimony over that of White because, even on direct examination, when White was asked whether information was provided to him during bargaining, he admitted '[i]t's been a

long time' [and] 'I would have to try to remember that.'" *Id.* (quoting Hearing Transcript, at 23). The Hearing Examiner found Mr. Starkes' testimony to be "more forthright and his demeanor more credible on this issue." *Id.* Since determinations regarding the admissibility, relevance, and weight of evidence are reserved to the Hearing Examiner, the Board finds no error in his crediting of Mr. Starkes' testimony over Mr. White's. *Hoggard v. DCPS, supra*, Slip Op. No. 496 at 3, PERB Case No. 95-U-20. The Board further finds, based on its own review of the record and the evidence presented at the Hearing, that the Hearing Examiner's conclusion that CFSA complied with AFSCME's information request and therefore did not commit an unfair labor practice was reasonable, supported by the record, and consistent with Board precedent. *AFGE v. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

B. Negotiability

Under D.C. Official Code § 1-617.08, RIFs are a management right. *Doctors' Council of the District of Columbia v. District of Columbia Department of Youth and Rehabilitation Services*, 60 D.C. Reg. 16255, Slip Op. No. 1432 at p. 8, PERB Case No. 11-U-22 (2013). Generally, a management right does not relieve management of the duty to bargain over the impact and effects of, and procedures concerning, the exercise of management decisions. *American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO, v. District of Columbia Department of General Services*, 59 D.C. Reg. 12682, Slip Op. No. 1320 at ps. 2-3, PERB Case No. 09-U-63 (2012); *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections.*, 52 D.C. Reg. 2496, Slip Op. No. 722 at ps. 5-6, PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32 (2003); *AFGE v. DCOCC, supra*, Slip Op. No. 709 at p. 6, PERB Case No. 03-N-02; and *International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (1992). Notwithstanding, D.C. Official Code § 1-624.08 ("Abolishment Act") narrows this duty as it relates to RIFs. The Abolishment Act authorizes agency heads to identify positions for abolishment, establishes the rights of existing employees affected by the abolishment of a position, and establishes procedures for implementing and contesting an abolishment. *See* D.C. Official Code § 1-624.08(a)-(i), and (k). The Abolishment Act further provides, "[n]otwithstanding the provisions of § 1-617.08 or § 1-624.02(d), the provisions of this chapter shall not be deemed negotiable." D.C. Official Code § 1-624.08(j). *See also* Omnibus Personnel Reform Amendment Act, 1998, D.C. Law 12-124 (Act 12-326) ("An Act To . . . eliminate the provision allowing RIF policies and procedures to be appropriate matters for collective bargaining . . ."). As a result, a proposal that attempts to affect or alter RIF procedures is not within the scope of impact and effects bargaining and is therefore nonnegotiable. *American Federation of Government Employees, Local 631, and District of Columbia Water & Sewer Authority*, 59 D.C. Reg. 5411, Slip Op. No. 982 at p. 6, PERB Case No. 08-N-05 (2009); and *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, 49 D.C. Reg. 11141, Slip Op. No. 692 at p. 5, PERB Case No. 01-N-01 (2002).

In regard to AFSCME's contention that the Hearing Examiner erred when he stated he could not evaluate the substance of whether AFSCME's proposal was negotiable as part of the ULP proceeding before him, the Board notes that the issue in the *Teamsters* case that AFSCME cited in its Exceptions⁹ was whether the agency had a duty to bargain the impact and effects of a new drug testing policy. (Exceptions, at 2). The Board's statement in that case that issues concerning the negotiability of a subject may be resolved in ULP proceedings was made in response to the hearing examiner's finding in the matter that a ULP could not be proven because PERB had not previously determined *via* a negotiability appeal that drug testing was a mandatory subject of bargaining. *Teamsters v. DCPS, supra*, Slip Op. No. 249 at f. 4, PERB Case No. 89-U-17. The Board rejected the hearing examiner's finding and reasoned that D.C. Official Code § 1-618.8(b) presumes that almost all topics are subject to bargaining except those few that the CMPA specifically says are not. *Id.* Unlike the instant case, the parties in the *Teamsters* case had not engaged in the bargaining process, and neither of the parties had declared a specific proposal to be nonnegotiable. *Id.* Additionally, a negotiability appeal concerning the very subject in question was not concurrently pending before the Board when the *Teamsters* case was decided. *Id.* Further, while the CMPA does not specifically proscribe the negotiability of a drug testing policy, the Abolishment Act, *supra*, and the Omnibus Personnel Reform Amendment Act, *supra*, do proscribe the negotiability of RIF procedures. Also, the Board notes that its opinion in the *Teamsters* case merely stated that questions of negotiability "may" be decided in ULP proceedings, not that they must be. *Id.* Therefore, while the Board agrees that generally, issues of negotiability can be considered in ULP proceedings when appropriate, the Hearing Examiner in this case did not err when he elected not to do so on grounds that: 1) a concurrent negotiability appeal (PERB Case No. 10-N-03) addressing the very issue in question was still pending before the Board at the time of the Hearing; 2) PERB Case No. 10-N-03 had not been assigned to the Hearing Examiner; and 3) the question before the Hearing Examiner was not whether AFSCME's specific proposal was negotiable, but whether CFSA acted in bad faith during negotiations when it declared AFSCME's proposal nonnegotiable. The Board finds that the record demonstrates the Hearing Examiner adequately resolved the bad faith question before him when he noted that "AFSCME presented no testimony and no evidence" at the hearing to support its allegation that CFSA acted in bad faith during I&E negotiations, and when he found that, based on the record before him, he could not conclude that CFSA's declaration that the proposal was nonnegotiable was done in bad faith in violation of the CMPA. (Hearing Examiner's Report, at 19-20).

Addressing AFSCME's argument that its proposal was negotiable because it was similar to proposals concerning wages and bonuses for RIF'd employees that PERB has held are negotiable in the context of I&E bargaining, the Board disagrees because negotiating wages, bonuses, and severance pay does not constitute an attempt to alter an agency's RIF procedures. (Exceptions, at 5) (citing *Unions in Compensation Unions 20, v. DOH, supra*, Slip Op. No. 715, PERB Case No. 02-N-01 (2003); and *Unions in Compensation Unions 21, v. DOH, supra*, Slip Op. No. 674, PERB Case No. 02-N-02 (2002)). Instead, the Board considers AFSCME's proposal in this case to be much more similar to that which was proposed in *AFGE and WASA*,

⁹ *Teamsters v. DCPS, supra*, Slip Op. No. 249, PERB Case No. 89-U-17.

supra, Slip Op. No. 982, PERB Case No. 08-N-05. In that case the Board considered the negotiability of a proposal by a union that the agency be required to first attempt “furloughs, reassignment, retaining or restricting recruitment” and/or “utilize attrition and other cost saving measures to avoid or minimize the impact on employees of a RIF.” *Id.* The union in the case argued its proposal was negotiable because it did not: 1) mandate that the agency take any “specific” action when conducting a RIF; 2) require the agency to maintain any specific number of employees during or after a RIF; or 3) interfere with the agency’s right to implement or conduct a RIF. *Id.* The Board found that the union’s proposal constituted an attempt to alter the agency’s RIF procedures and was therefore nonnegotiable pursuant to the Omnibus Personnel Reform Amendment Act. *Id.*, at 6. In *American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO and District of Columbia Child and Family Services Agency*, Slip Op No. 1462 at ps. 4-5, PERB Case No. 10-N-03 (April 30, 2014), which, as stated previously, is directly related to this ULP case, the Board, relying on *AFGE and WASA, supra*, Slip Op. No. 982, PERB Case No. 08-N-05, held that AFSCME’s proposal similarly attempted to minimize the effects of CFSA’s RIF on bargaining unit employees by demanding that CFSA keep all of the SSAs on for three and half (3.5) years in the new FSW positions regardless of the degree requirement. The Board further found that AFSCME’s proposal “constituted an attempt: 1) to alter or affect CFSA’s RIF procedures; 2) to frustrate CFSA’s purposes for conducting the RIF; and 3) to interfere with CFSA’s rights to direct and assign employees, establish work priorities, and establish job requirements that fulfill the Agency’s mission and functions.” *Id.* (also citing *AFGE v. DCOCC, supra*, Slip Op. No. 709 at p. 8, PERB Case No. 03-N-02).¹⁰ Based on the foregoing, the Board finds that AFSCME’s proposal that CFSA ignore its degree requirement for FSWs for three and a half (3.5) years is not similar to negotiating the past wages, bonuses, or severance pay of RIF’d employees, as AFSCME contends.

Additionally, the Board rejects AFSCME’s contention that by declaring its specific proposal nonnegotiable, CFSA took the position that the entire matter was nonnegotiable. (Exceptions, at 6). Indeed, AFSCME implies in a number of its arguments¹¹ that CFSA’s position was that it had no obligation to participate in I&E bargaining over its decision to conduct the RIF and to create the new FSW positions and that any proposal made by the Union would have therefore been nonnegotiable. *See* Footnote 11, herein. The Board finds nothing in the record or the Hearing Examiner’s Report to support that conclusion. Indeed, the Hearing Examiner noted that it was “undisputed between the parties that they met three times to negotiate

¹⁰ The Board applies this same reasoning as its basis for rejecting AFSCME’s argument that its proposal was negotiable because it addressed the implementation of the RIF, not the decision to conduct the RIF itself. (Exceptions, at 6).

¹¹ i.e. AFSCME’s contentions that: 1) the reasonableness of its proposal’s merits was “irrelevant” to the question of “whether [AFSCME] had the right to make the proposal and to bargain over the implementation of the new job requirements”; 2) it had every right to engage in I&E bargaining over CFSA’s decision even if its proposal was unreasonable; 3) the Hearing Examiner erred when he failed to address whether CFSA waived its right to declare AFSCME’s proposal nonnegotiable by making “substantially similar (though quantitatively different)” counterproposals during I&E bargaining; and 4) the Hearing Examiner erred when he failed to address whether CFSA acted in bad faith by first engaging in negotiations and then reversing its initial position and declaring the matter to be nonnegotiable. (Exceptions, at 6-8).

[the] impact and effects of the RIF and the creation of the FSW positions on May 13, 19 and 25, 2010.” (Hearing Examiner’s Report, at 3). In addition, everything in CFSA’s pleadings and statements at the Hearing indicates that it only declared AFSCME’s specific proposal nonnegotiable, not the entire I&E process. Indeed, the letter CFSA initially sent declaring the proposal nonnegotiable makes this point very clear. It stated:

One of the Union’s demands during our impact and effect bargaining was to have the Agency delay implementation of its degree requirement for three and one half years. This extensive delay of a management right is equal to nullifying that right. Therefore, I am giving you formal notice *that that proposal* is nonnegotiable and the Agency will not consider *it* during impasse.

See *AFSCME and CFSA, supra*, Slip Op No. 1462 at f. 3, PERB Case No. 10-N-03 (emphasis added). PERB precedent well documents that specific proposals can be declared nonnegotiable during the bargaining process. See PERB Rule 532.4¹²; *AFGE and WASA, supra*, Slip Op. No. 982, PERB Case No. 08-N-05; and *FOP v. DOC, supra*, Slip Op. No. 692 at p. 5, PERB Case No. 01-N-01. While the Board agrees that CFSA was obligated to participate in I&E bargaining,¹³ based on the foregoing the Board rejects AFSCME’s arguments that CFSA reversed its initial position regarding that obligation and/or that CFSA waived its ability to invoke the nonnegotiability of AFSCME’s proposal when it initially engaged in the process and exchanged counterproposals.¹⁴

Concerning AFSCME’s contention that the Hearing Examiner erred when he found there was no evidence on the record to show CFSA acted in bad faith by implementing the RIF and creating the FSW positions before 10-I-06 was fully resolved, the Board agrees with CFSA that D.C. Official Code § 1-617.17(f)(4) and *UDCFA/NEA v. UDC, supra*, Slip Op. No. 485, PERB Case No. 96-U-14 are only applicable to compensation negotiations. (Opposition to Exceptions, at 5-6). The Board notes that although D.C. Official Code § 1-617.17(f)(3A) permits parties to request that disputed non-compensation matters be mediated or arbitrated concurrently with disputed compensation-related matters, a plain reading of the statute and Slip Op. No. 485 suggests that there must first be a compensation-related dispute as described in D.C. Official Code § 1-617.17(b) and §§ 1-617.17(f)(1)-(3) in order for the *status quo* provision in D.C. Official Code § 1-617.17(f)(4) to have any effect on non-compensation disputes. Because there is no evidence on the record showing that the parties were also negotiating a compensation issue related to D.C. Official Code § 1-617.17(b) or §§ 1-617.17(f)(1)-(3) during their I&E sessions, the Board finds the Hearing Examiner did not err, as AFSCME alleges.

¹² Which states, in part, that: “... a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that *a proposal* is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA.” (Emphasis added).

¹³ See *AFSCME v. DCDGS, supra*, Slip Op. No. 1320 at ps. 2-3, PERB Case No. 09-U-63.

¹⁴ The Board applies this same reasoning to reject AFSCME’s similar contention in its second exception that CFSA acted in bad faith when it reversed its initial position and declared AFSCME’s proposal nonnegotiable. (Exceptions, at 8).

In response to AFSCME's exception to the Hearing Examiner's statement that "[t]he case record establishes that AFSCME has not advanced its negotiability appeal [PERB Case No. 10-N-03] or sought resolution of the negotiability dispute through a PERB determination regarding AFSCME's proposal", the Board agrees with AFSCME that there is no Rule that required AFSCME to advance its appeal in PERB Case No. 10-N-03 any further than it had already proceeded. (Exceptions, at 9). Notwithstanding, the Board finds that the Hearing Examiner's statement is moot because the case in question has since been decided in CFSA's favor. *See AFSCME and CFSA, supra*, Slip Op No. 1462, PERB Case No. 10 N-03.

Additionally, the Board rejects AFSCME's contentions that the Hearing Examiner erred by referring to the record in PERB Case 10-N-03 because, as CFSA noted, AFSCME made reference to PERB Case No. 10-N-03 in paragraph 24 of its ULP Complaint, and thus made it part of this case's record. (Opposition to Exceptions, at 6). Because issues concerning the probative value of evidence are reserved to the Hearing Examiner, the Board rejects AFSCME's argument that it was prejudicial for the Hearing Examiner to reference the record in PERB Case No. 10-N-03 but not that of PERB Case No. 10-I-06 because AFSCME failed to demonstrate that there was anything in the record of PERB Case No. 10-I-06 that would have negated the Hearing Examiner's findings in this case. *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 45 D.C. Reg. 4022, Slip Op. No. 544 at p. 3, PERB Case No. 97-U-07.

The Board notes that upon its review of the Hearing Transcript, none of the arguments or authority AFSCME relied on in its Exceptions were presented as exhibits or established by testimony at the Hearing. Indeed, while the crux of AFSCME's exceptions are that the Hearing Examiner erred by failing to find that CFSA acted in bad faith by declaring AFSCME's proposal nonnegotiable, the Hearing Transcript shows that AFSCME only mentioned the words "bad faith" once during the entire Hearing, and only then mentioned it to state it would discuss the issue more fully in its post-hearing brief. (Hearing Transcript, at 16). Therefore, the Board finds that the Hearing Examiner's conclusion that "AFSCME presented no testimony and no evidence in support of [its] allegation at [the] hearing" was reasonable and supported by the record. *AFGE v. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12. Furthermore, upon examining the record, and in consideration of the foregoing analysis of AFSCME's exceptions, and based on the undisputed fact that CFSA complied with all of the requirements of PERB Rule 532 *et seq.* when it declared AFSCME's proposal nonnegotiable, the Board holds that the Hearing Examiner's findings that "there is no evidence of bad faith on CFSA's part during bargaining" and that CFSA did not act in bad faith when it declared AFSCME's proposal nonnegotiable were reasonable, supported by the record, and consistent with Board precedent. (Hearing Examiner's Report, at 19-20); *and AFGE v. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

C. Bypass and Direct Dealing

Employers have a right to communicate with their employees, but cannot in those communications: invite the employees to abandon their representatives; indicate that the employees can achieve better terms of employment by dealing directly with the employer; make threats regarding a loss of a wage increase or collection of wages already paid; disparage or undermine the union as the employees' exclusive representative; or induce the employees to put pressure on union leadership. *AFSCME, et al, v. D.C. Gov't, et al., supra*, Slip Op. No. 200 at ps. 5-6, PERB Case No. 88-U-32.

In the instant case, the Board agrees with the Hearing Examiner that "a fair reading" of the June 7, 2010, Gerald email demonstrates that it did not, by itself, amount to a violation of the CMPA because it did not "manifest an effort by CFSA to deal directly with bargaining unit employees, or disparage or undermine AFSCME as the bargaining unit employee's exclusive representative." *Id.*; *and* (Hearing Examiner's Report, at 22). Additionally, the Board has confirmed by its own examination of the record that AFSCME did not present any evidence or testimony at the Hearing to support its allegation and that, indeed, the only time AFSCME mentioned the email at the Hearing was during its opening statement. (Hearing Transcript, at 15). Therefore, the Board finds that the Hearing Examiner's conclusion that the email did not constitute a violation of the CMPA was reasonable, supported by the record, and consistent with Board precedent. (Hearing Examiner's Report, at 22); *and AFGE v. WASA, supra*, Slip Op. No. 702, PERB Case No. 00-U-12.

D. Decision

Based on all of the foregoing, and in consideration of the record as a whole, the Board agrees with the Hearing Examiner's recommendation that AFSCME's Complaint be dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant'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, and Members Donald Wasserman and Ann Hoffman

April 30, 2014

CERTIFICATE OF SERVICE

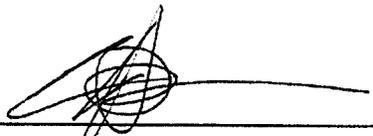
This is to certify that the attached Decision and Order in PERB Case No. 10-U-37, Slip Op. No. 1463, was transmitted via U.S. Mail and e-mail to the following parties on this the 5th day of May, 2014.

Brenda C. Zwack, Esq.
O'Donnell, Schwartz & Anderson, P.C.
1300 L Street, N.W.
Suite 1200
Washington, DC 20005
BZwack@odsalaw.com

VIA U.S. MAIL AND EMAIL

Dean Aqui, Esq.
D.C. Office of Labor Relations and Collective Bargaining
441 4th St, N.W.
Suite 820 North
Washington, DC 20001
Dean.Aqui@dc.gov

VIA U.S. MAIL AND EMAIL



Colby J. Harmon
PERB