

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 formal 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:)	
)	
INTERNATIONAL BROTHERHOOD OF)	
POLICE OFFICERS, LOCAL 445,)	PERB Case No. 01-U-03
)	
)	Opinion No. 704
Complainant,)	
)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
OFFICE OF PROPERTY MANAGEMENT,)	
)	
)	
Respondent.)	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the International Brotherhood of Police Officers, Local 445 ("Complainant" or "IBPO") against the District of Columbia Office of Property Management ("Respondent", "OPM" or "Agency"), alleging that OPM violated D.C. Code §1-617.04 (a)(1) and (5)(2001 ed.)¹. Specifically, the Complainant asserts that OPM committed an unfair labor practice by failing to bargain, upon request, over the impact and effects of its decision to contract out security work that had formerly been performed by bargaining unit Security Officers to non-bargaining unit Security Guards.²

¹Throughout this Opinion, all references to the D.C. Code will refer to the 2001 edition, unless otherwise noted.

²In September 1999, shortly after Thomas Francis became the new Chief of OPM's Office of Protection Services, he concluded that a staffing shortage would no longer permit the Agency to continue to fulfill its then-mission of staffing fixed posts with bargaining unit Security Officers. In making this decision, Chief Francis relied on Federal Position Classification Guidelines to determine that manning fixed posts was more properly classified as
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The Respondent denies the allegation. The Respondent claims that the Management Rights provisions of the Comprehensive Merit Personnel Act³ (CMPA) authorize it to contract out work that has never been classified as bargaining unit work. Additionally, the Agency contends that: (1) a staffing emergency entitled it to employ contract guards at the fixed posts; (2) the parties' past practice, pursuant to Article 15 of the parties' now-expired collective bargaining agreement--- permits it to reassign bargaining unit employees in the event of an emergency; and (3) OPM met its statutory obligation to bargain over the usage of contract guards at fixed posts during a November 20, 2000 meeting with the Union.

A hearing was held and the Hearing Examiner issued a Report and Recommendation.⁴ (R &R). The Hearing Examiner found that the Respondent violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.).⁵ As a result, he recommended a *status quo ante* remedy, which would return

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Security Guard work. As a result, he determined that manning fixed posts would no longer be the mission of OPM's bargaining unit Security Officers. Instead, Patrol and Compliance would be their new mission, and contract Security Guards would fulfill their former mission of manning fixed posts. He notified bargaining unit members of this change by letter on July 19, 2000. IBPO requested to bargain over the issue by letter on at least two separate occasions. While the parties did meet on September 8th to discuss OPM's proposed changes in bargaining unit members' work assignments, they never bargained over the impact and effects of the Agency's decision to use contract guards instead of bargaining unit members to man fixed posts. As a result, IBPO contends that OPM violated D.C. Code §1-617.04(a)(1) and (5).

³ D.C. Code § 1-617.08(a) (6) (2001 ed.) provides that management has the right, in accordance with applicable laws and rules and regulations, to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations."

⁴The issue before the Hearing Examiner was the following: Did OPM wrongfully fail to engage in impact and effects bargaining over its decision to assign contract guards to fixed posts at certain locations, including 441 4th Street, NW and 300 Indiana Ave, NW?

⁵In concluding that OPM violated D.C. Code §1-617.04 (a) (1) and (5) (2001 ed.), the Hearing Examiner first acknowledged that notwithstanding any issue of work classification, exclusively bargaining unit Officers had been staffing these fixed posts. He then noted that Chief Thomas Francis acknowledged that the mission of the Agency had been one of staffing these fixed posts, and not one of Patrol and Compliance. Furthermore, the Hearing Examiner observed that, so far as the record shows, no one other than bargaining unit Officers had staffed these fixed posts prior to the action giving rise to this proceeding. On this basis, the Hearing Examiner concluded that "the Agency in fact altered the working conditions of the bargaining unit Officers when it determined to assign contract guards to posts formerly and exclusively

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the bargaining unit personnel to the very work assignments they traditionally occupied at fixed posts. Also, the Hearing Examiner recommended that the Agency be ordered to bargain, as appropriate, with the IBPO concerning its decision to contract out work formerly performed exclusively by bargaining unit employees. OPM filed Exceptions to the Hearing Examiner's R&R.

In its Exceptions, OPM disagrees with the Hearing Examiner's findings. Specifically, OPM asserts that the Hearing Examiner's conclusion that the Respondent did not engage in impact and effects bargaining is: (1) incorrect; (2) internally inconsistent with the Hearing Examiner's own findings; and (3) unsupported by the record.⁶ (Exceptions at p. 7). Additionally, the Respondent asserts that the Hearing Examiner's characterization of Chief Thomas Francis's correction of a long overdue classification error as an "Agenda"...is not reflective of the admitted, uncontested record evidence regarding this point. Furthermore, OPM argues that the classification issue improperly influenced the Hearing Examiner's decision. The Agency also raised two procedural arguments concerning the form⁷ of the Hearing Examiner's recommended remedy and the Hearing Examiner's

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staffed by bargaining unit Officers." (R & R at p. 7). To support his position, the Hearing Examiner relied on Board precedent in finding that, " even if Chief Francis is correct in determining that bargaining unit Officers should not properly have been assigned to those fixed posts... a question that the Hearing Examiner emphasizes is not challenged in this proceeding...the Agency; nevertheless, is required to negotiate the impact and effects of the decision to change the working conditions of bargaining unit employees." (R & R at p.8) International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321 Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.*, District of Columbia General Hospital v. Public Employee Relations Board & International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993) ; International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). The Hearing Examiner reached this conclusion despite the Agency's contention that the work assigned to the contract guards is not bargaining unit work.

⁶In this Exception, the Agency asserts that the bargaining which took place between the parties concerning the Agency's changed mission and the bargaining unit's new work assignments fulfilled its bargaining obligation under the CMPA. The Board finds that this is merely a disagreement with the Hearing Examiner's finding that the bargaining which took place between the parties was not sufficient. As mentioned earlier, the Hearing Examiner concluded that the parties should have bargained concerning the impact and effects of management's decision to assign contract guards to bargaining unit members' work assignments, prior to the decision being implemented.

⁷OPM contended that the Hearing Examiner's recommended remedy was written more
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decision to allow the testimony of a rebuttal witness, over the Respondent's objection.⁸

After reviewing the record, the Board finds that the Agency's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where those findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Also, the Board has rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Parks and Recreation, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we reject OPM's exceptions concerning the Hearing Examiner's finding that the Agency violated the CMPA.

We have held that an Agency must bargain over the impact and effects of a management's right decision, upon request.⁹ The record is clear that IBPO made a request to bargain and that OPM

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like an Order than a recommendation.

⁸OPM asserts that this witness was so vital to the case that she should have been presented in the IBPO's case-in-chief and the fact that this witness gave testimony after all of the other witnesses had been heard prejudiced its case. The Board finds no merit to this argument. The Board's rules are clear that the Hearing Examiner has the authority to rule on the parties' objections in the course of a Hearing. (See, Board Rules 550.13 and 550.14- which respectively, outline the Hearing Examiner's authority and set forth the procedure by which objections are heard before a Hearing Examiner). OPM merely disagrees with the Hearing Examiner's ruling on this issue. Therefore, the Board finds that this mere disagreement does not provide a basis for rejecting the Hearing Examiner's recommendation.

⁹ See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1992), *aff'd sub nom.*, District of Columbia General Hospital v. Public Employee Relations Board. & International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993) ; International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322 at pages 3 and 5, PERB Case No. 91-U-14 (1992)- where the Board held that D.C. General Hospital (DCGH) violated the CMPA by refusing to bargain in good faith over the impact and effects of its decision to require special police officers to transport mental observation patients from one department of the hospital to another. IBPO v. DCGH, 39 DCR 9633, Slip Op. No. 322 at pages 3 and 5, PERB Case No. 91-U-14 (1992). Because this decision concerned DCGH's's right to determine its internal security practices, the
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did *not* engage in such bargaining. As a result, the Board finds that the Hearing Examiner's finding that OPM committed an unfair labor practice is reasonable, persuasive, and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding on this issue.

Since we have adopted the Hearing Examiner's finding that OPM violated the CMPA, we now turn to the issue of what is the appropriate remedy. As relief, IBPO sought an order directing the parties to bargain over the impact and effect of OPM's decision and a *status quo ante* remedy. However, the Agency argued that a *status quo ante* remedy would *not* be appropriate because, *inter alia*, it would disrupt or impair the Agency's operations.

As noted earlier, to remedy this unfair labor practice, the Hearing Examiner recommended that the Board issue an order directing the Respondent to bargain, as appropriate, over its decision to contract out fixed post duties formerly performed exclusively by bargaining unit personnel. In addition, the Hearing Examiner recommended that the Board Order OPM to: (1) post an appropriate notice of its violation of the law and (2) implement a *status quo ante* remedy.¹⁰

The Hearing Examiner supported his recommended relief by making the several observations. First, the Hearing Examiner noted that "a refusal to grant such an order would eviscerate the Union's right to engage in impact and effects bargaining" over the Agency's decision to assign contract guards work that had previously and exclusively been performed by bargaining unit personnel. (R & R at p.11). Additionally, he observed that "the record shows that the Agency fundamentally misconstrued its bargaining obligations in this matter and literally ignored its obligation to engage in such bargaining." (R & R at p.11). Furthermore, the Hearing Examiner concluded that he was not persuaded that a *status quo ante* order would adversely affect the Agency's mission, nor was he persuaded that this remedy would negate any management right. Rather, he concluded that such a remedy will do no more than return the parties to the position they should have been in before the Agency wrongfully failed to engage in impact and effects bargaining.

⁹(...continued)

Board found that only impact and effects bargaining was required. See, *Id.* and D.C. Code §1-617.08 (a)(5). The Board noted that "where there exists a duty to bargain over the impact and effects of...decisions involving the exercise of a managerial prerogative...categorically refusing to bargain over those aspects..., prior to implementation" is done so at the "risk" of the party having the duty. *Id.* at pg. 4. In addition, the Board found that DCGH's act of meeting with employees for input concerning the decision was not bargaining; therefore, it was insufficient for meeting its bargaining obligation. *Id.* As a result, the Board concluded that DCGH violated D.C. Code §1-617.04 (a)(5). *Id.*

¹⁰ In recommending that *status quo ante* relief be granted, the Hearing Examiner suggested that the Board order that bargaining unit Officers be returned to their fixed posts and that bargaining begin concerning the impact and effects of management's decision to use contract guards to perform bargaining unit work.

(R & R at p. 11). Finally, he noted that the issuance of a *status quo ante* remedy under the circumstances of this case is supported by the Board's case law. See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) and (R & R at p. 13).

The Respondent excepted to the Hearing Examiner's recommended remedy. Specifically, OPM asserts that the Hearing Examiner's proposed remedy has no basis in law or under the facts presented at the hearing.¹¹ Furthermore, the Agency claims that this *status quo ante* remedy is wholly inappropriate under the facts of this impact and effects bargaining case. OPM asserts that the Hearing Examiner's recommended remedy "obviously ignores the Board's recent movement in this area of remediation." (Exceptions at p. 11). OPM relies on the Board's Decision in Fraternal Order of Police/Metropolitan Police Labor Committee v. Metropolitan Police Department¹²(FOP/MPDLC v. MPD) to support of its claim that a *status quo ante* remedy is not appropriate in this case. 47 DCR 9633, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). Furthermore, OPM contends that the Hearing Examiner's reliance on International Brotherhood of Police Officers, Local 446, AFL-CIO v. District of Columbia General Hospital is improper and is not controlling¹³.

¹¹ Specifically, OPM claims there is absolutely no evidence demonstrating that additional bargaining would change the Respondent's decisions in this matter. (R & R at 12) Furthermore, OPM contends that the removal of protective service police officers from their Patrol and Compliance duties and returning them to fixed posts would seriously impact the effectiveness of the Agency and impede the redirection of the Agency's mission. In the Respondent's view, these actions could potentially affect the costs of existing service contracts and result in immediate staffing shortages. (R & R at p. 12). The Agency also relied on AFGE, Local 872 v. D.C. Department of Public Works, where the Board held that restoration of *status quo ante* was inappropriate where: (1) DPW's bargaining obligations only attached to the impact and effects of a RIF and no evidence establishes that bargaining would have any effect on the RIF and (2) rescission of RIF would disrupt or impair DPW's operations. 49 DCR 1145, Slip Op. NO. 439; PERB Case No. 94-U-02 and 94-U-08 (2002).

¹² In FOP/MPDLC v. MPD, the Board held, *inter alia*, that the restoration of the *status quo ante* is generally inappropriate to redress a refusal to bargain over impact and effects of a decision made pursuant to the management rights provisions of the CMPA. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000).

¹³In response to this particular argument, the Board believes that the Hearing Examiner used the correct legal standard in determining that impact and effects bargaining was required under the facts of the present case, as set forth in IBPO, Local 446, AFL-CIO v. DCGH, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-12 (1992). In response to OPM's contention that the Hearing Examiner's recommended remedy "obviously ignores the Board's

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39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) and (R & R at p. 13).

When a violation is found, the Board's order is intended to have therapeutic, as well as remedial effect. AFSCME Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644, and PERB Case No. 98-U-05 (2001); D.C. Code §§1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id.

The Board has held that *status quo ante* relief is generally inappropriate to redress a refusal to bargain over impact and effects. FOP/MPDLC v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). Furthermore, the Board has determined that *status quo ante* relief is *not* appropriate when the: (1) rescission of the management decision would disrupt or impair the Agency's operation; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. Id.

After reviewing the record and relevant Board precedent as noted above, we find that *status quo ante* relief is *not* appropriate in the present case. Specifically, the Board finds that returning the workers to the positions that they were in prior to management's decision to hire contract Security Guards after such a significant lapse of time would be disruptive to OPM's operations. Furthermore, we find that there is *no* evidence in this case that the results of further bargaining would negate OPM's decision to use contract Security Guards. As a result, we reject the Hearing Examiner's recommendation concerning *status quo ante* relief.¹⁴ However, we adopt the Hearing Examiner's recommendation concerning other appropriate relief. On this basis, the Board directs that the parties bargain over the impact and effects of OPM's decision to hire contract guards to man fixed post locations. Additionally, the Board directs that OPM post a notice indicating that it has committed an unfair labor practice by the actions described in this Opinion.

In ordering the parties to bargain over the impact and effects of OPM's decision to hire contract guards to man fixed post locations, the Board recognizes that the passage of time may have

¹³(...continued)

recent movement in this area of remediation, the Board notes that AFGE, Local 872 v. D.C. Department of Public Works, and FOP/MPDLC v. MPD do, in fact, give more specific guidance on when awarding *status quo ante* relief is appropriate; however, we do not believe that the Hearing Examiner's use of IBPO, Local 446, AFL-CIO v. DCGH was improper, although it certainly is not controlling precedent on the standard for granting *status quo ante* relief. See, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-12 (1992); 49 DCR 1145, Slip Op. NO. 439, PERB Case No. 94-U-02 and 94-U-08 (2002) and 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000).

¹⁴We grant OPM's exception on the issue concerning *status quo ante* relief only. As noted above, we do not believe that *status quo ante* relief is appropriate in this case.

rendered some of the issues concerning management's decision *moot*. Nevertheless, we believe that ordering the parties to engage in impact and effects bargaining over issues which are still *ripe* or relevant is appropriate. We believe that this remedy will achieve the goals of the Board's remedies, as outlined in the CMPA and the relevant Board precedent.

Pursuant to D.C. Code §1-605.2(3) (2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings and recommended remedy, with the exception of his recommendation concerning *status quo ante* relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Office of Property Management (OPM), its agents and representatives, shall cease and desist from violating D.C. Code §1-617.04(a)(1) and (5) (2001 ed.), by refusing to bargain on request concerning the impact and effects of its decision to contract out security duties at fixed post locations that had formerly been staffed by bargaining unit employees.
2. The Board directs the parties to commence bargaining over the impact and effects of any issues that are still ripe or relevant to OPM's decision to contract out security duties at fixed posts within (30) days of the issuance of this Opinion.
3. OPM shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. OPM shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted.
5. Within forty-five (45) days from the date of this Order, OPM shall notify the Public Employee Relations Board (PERB), in writing, of the steps that it has taken to comply with paragraph number 2 of this Order.
6. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

April 11, 2003



Public
Employee
Relations
Board

Government of the
District of Columbia



415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA OFFICE OF PROPERTY MANAGEMENT (OPM), 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. 704, PERB CASE NO. 01-U-03 (April 11, 2003).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employees Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from refusing to bargain in good faith with the International Brotherhood of Police Officers, Local 445, by the conduct set forth in Slip Opinion No. 704.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Office of Property
Management

Date: _____ By _____
Director

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 the Notice or compliance with any of its provisions, they may communicate directly with the Public Employees Relations Board, whose address is: 717 14th Street, N.W., Suite 1150; Washington, D.C. 20005. Phone: (202) 727-1822.

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

April 11, 2003

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 01-U-03 was transmitted via Fax and /or U.S. Mail to the following parties on this 11th day of April 2003.

Jennifer Wasserstein, Esq.
International Brotherhood
of Police Officers
317 South Patrick Street
Alexandria, VA 22314

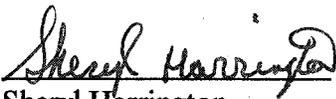
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