

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYER RELATIONS BOARD**

In the Matter of:)
AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES, LOCAL 872,) PERB Case No. 00-U-12
Complainant,) Opinion No. 702
v.)
DISTRICT OF COLUMBIA)
WATER AND SEWER AUTHORITY,)
Respondent.)
)

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 872¹ ("Complainant", "AFGE" or "Union") alleging that the District of Columbia Water and Sewer Authority ("Respondent", "WASA" or "Agency") violated D.C. Code §1-617.04 (a)(1) and (5) (2001 ed.). Specifically, AFGE alleges that WASA committed an unfair labor practice by failing to bargain, upon request, over the impact and effects of its decision to implement a Reorganization.²

¹AFGE, Local 872, represents all non-professional employees employed by the District of Columbia Water and Sewer Authority, including individuals in the Bureau of Water Measurement and Billing and the Bureau of Water Services.

²A brief description of the facts in this case follows: In August 1999, Jocelyn Johnson, who was then AFGE's President, learned of an upcoming proposed reorganization from a high level management official who told her to keep the information confidential. On August 25, 1999, Ms. Johnson sent an e-mail to Stephen Cook, WASA's Director of Labor Relations, requesting bargaining over the impact and effects of any planned reorganization. On August 26, 1999, she sent a letter to Mr. Cook reiterating her request to bargain over the reorganization. Mr. Cook responded to Ms. Johnson and denied having any knowledge of any reorganization.

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The Respondent denies the allegation. Specifically, the Respondent claims that the request to bargain was prematurely made since the decision to reorganize was not final when the Union first made its request. WASA relies on the Board's precedent in Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department (FOP v. MPD) to support its position. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). In FOP v. MPD³, the Board held that there is no duty to bargain over the impact and effects of a management right decision unless and until the decision is made. Id. WASA also claims that the Union had a duty to make another request once they received official notice that the reorganization would definitely take place. WASA relies on FOP v. MPD to support this point.⁴ Id. Furthermore, WASA claims that the Union waived its right to bargain over the issue by failing to make the second request once it was notified of the Agency's final decision to reorganize. Finally, WASA asserts that it met its bargaining obligation because it met with employees concerning the decision prior to its implementation.

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that WASA violated the Comprehensive Merit

²(...continued)

On October 15, 1999, the Union was given notice that a reorganization would take place and would become effective on November 1, 1999. The letter which notified employees of the change indicated that management had been considering the reorganization for several months. Mr. Cook admitted later that he drafted that particular letter.

³In FOP v. MPD, FOP filed an unfair labor practice complaint against MPD alleging that MPD refused to bargain over the impact and effects of proposed changes in the officers' "days off and watch" schedule. 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). MPD proposed the change, but later decided not to implement the change. Id. The Board held that where an employer decides not to implement or suspends implementation of a management right decision, no duty to bargain over its impact and effects exists. Id. Under the facts of FOP v. MPD, the Board found that it was premature to conclude that MPD had violated the CMPA by failing to bargain over a proposed, but unimplemented schedule change. Id.

⁴In FOP v. MPD, the Board also observed that "in the interest of advancing the collective bargaining process, the better approach, upon being faced with [such] an effective refusal to bargain over any aspect of management's decision, is [for the union] to then make a second request to bargain with respect to the specific effects and impact of the management decision." 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999). However, the Board qualified that statement by indicating that "a second request to bargain is not required to establish a violation of the CMPA." Id. at p. 4.

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Personnel Act (CMPA) by failing to bargain over the impact and effects of the reorganization.⁵ Specifically, the Hearing Examiner found that AFGE's request to bargain was both timely and specific.⁶ In addition, she credited Jocelyn Johnson's testimony that she persisted with her request to bargain, even after official notice of the reorganization was sent to employees. The Hearing Examiner made her finding that the request was timely and specific, notwithstanding the fact that Ms. Johnson failed to send another written request. Furthermore, the Hearing Examiner found that "in addition to the statutory obligation to bargain over the impact and effects of management's decision, the parties' collective bargaining agreement is clear and unambiguous with regard to the parties' obligations." (Report at p. 10). The Hearing Examiner noted that WASA complied with two of the requirements for implementing a management right pursuant to Article 4 §B of the parties' collective bargaining agreement. However, the Hearing Examiner noted that WASA failed to meet the final requirement which required bargaining over the decision, upon request.⁷ In response to WASA's argument that the Union waived its right to bargain by not making a second request to bargain once the notice was sent out to employees, the Hearing Examiner concluded that the absence of such a request, does not constitute a waiver of the earlier bargaining demand. Furthermore, she stated that in the absence of a clear and unmistakable waiver, or an express retraction of a previous request to bargain, there is no support for the position that management had no obligation to engage in impact bargaining. See, Department of Health and Human Services, Social Security Administration, 31 FLRA No. 39 (1988). Based on the foregoing, the Hearing Examiner concluded that the Respondent violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed.) of the CMPA by its failure and refusal to bargain with the Complainant.

WASA filed Exceptions to the Hearing Examiner's Report and AFGE filed an Opposition. In it's Exceptions, WASA contends that the Hearing Examiner erred in finding that WASA refused to bargain in good faith with the Union. The Agency reiterates its argument that AFGE did not make

⁵ First, the Hearing Examiner stated that it is well settled that management has certain statutory rights that it may exercise at its discretion. However, it is also well settled that management must bargain, upon request, over the impact and effects of its decisions pursuant to these reserved rights. To support this position, the Hearing Examiner relied on the Board's precedent in American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority, 47 DCR 7203,7206, Slip Op. No. 630, PERB Case No. 00-U-19 (2000).

⁶The Hearing Examiner noted that the August 26, 1999 letter from Johnson to Cook met both requirements. (R & R at 9).

⁷Article 4 §B of the parties' collective bargaining agreement, entitled "Impact of the Exercise of Management's Rights", sets forth three requirements that management must meet prior to implementing a management right decision. Specifically, management must: (1) give notice to the Union leadership concerning the proposed change; (2) provide information which was relied on to propose the change; (3) negotiate concerning the change, upon request, as appropriate.

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a timely and specific request to bargain. Furthermore, WASA argues that there is no duty to bargain over a proposed, but unimplemented management right decision and cites American Federation of Government Employees, Local 383 v. D.C. Department of Human Services in support of that position. 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). Finally, the Agency reiterates its argument that the Union should have made a second request to bargain. By contrast, AFGE's Opposition basically agrees with the Hearing Examiner's findings and asserts that WASA improperly raised arguments in its Exceptions that were not raised during the proceedings or in its post-hearing brief. AFGE's Opposition also repeated arguments that it made during the proceedings.

After reviewing the record in the present case, we find that the Hearing Examiner's findings are reasonable and supported by the record. The Board's precedent is clear that an Employer violates the duty to bargain in good faith by refusing to bargain over the impact and effects of a management rights decision upon request. The Hearing Examiner found that the facts demonstrate that the Union requested to bargain over the Agency's decision to implement a reorganization, and the Agency acknowledged that no such bargaining took place, even though they contend that they met with the employees to get their input. These facts, taken together with the Hearing Examiner's findings that the Board's case law requires such bargaining, make it reasonable to conclude that the Agency refused to bargain collectively in good faith with the exclusive representative, thereby committing an unfair labor practice in violation of § 1-617.04(a)(1) and (5) (2001 ed.) of the CMPA.

Additional review of the record reveals 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 the findings are fully supported by the record. American Federation of Government Employees 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). The Board has also 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 Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). On this basis, we conclude that the Agency's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that WASA committed an unfair labor practice by: (1) violating the duty to bargain in good faith; and (2) refusing to bargain concerning its reorganization.

Since we have adopted the Hearing Examiner's finding that WASA violated the CMPA, we now turn to the issue of what is the appropriate remedy. As relief, AFGE seeks an order requiring that WASA: (1) immediately begin bargaining with the Union concerning the impact and effects of the reorganization on the 29 transferred employees and on the other employees now in the

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Department of Water Services⁸ and; (2) reimburse AFGE for all costs incurred in filing this Complaint. (Complaint at p.3).

As a remedy for WASA's unfair labor practice, the Hearing Examiner recommended that the Board issue an order directing the Respondent to bargain over the impact and effects of its decision to reorganize, and to grant any other relief that the Board deems appropriate.

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.

We believe that the Hearing Examiner's recommended relief is reasonable and consistent with the mandates of the CMPA. Therefore, we adopt her recommendation that the parties be directed to engage in impact and effects bargaining.

In ordering that the parties bargain over the impact and effects of the reorganization, the Board recognizes that the passage of time may have rendered some of the issues concerning the reorganization *moot*. Nevertheless, we believe that ordering the parties to bargain over issues which are still *ripe* or relevant is appropriate.

Finally, by directing that the parties bargain over the impact and effects of the reorganization, we want to make it clear that we are not ordering that WASA reverse its decision to reorganize. The Board recognizes that WASA has the right to reorganize pursuant to D.C. Code §1-617.08 (2001 ed.). Therefore, we are *not*, by this decision, seeking to reverse management's decision to reorganize.⁹ To the contrary, the reorganization stands.

⁸In its post-hearing brief, AFGE elaborates on its requested relief by stating that the Board "should direct WASA to bargain over the impact and effects of the reorganization *and to implement any resulting agreement both prospectively and, if appropriate, retroactively.*" (AFGE's Brief at p. 11).

⁹Reversing WASA's decision to reorganize would be tantamount to granting *status quo ante* relief. The Board has held that *status quo ante* relief is generally inappropriate to redress a refusal to bargain over impact and effects. 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. FOP v. MPD, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In the present case, we find that *status quo ante* relief, is not appropriate. The Board finds that returning the workers to the positions that they

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Additionally, the Board directs that WASA post a notice indicating that it has committed an unfair labor practice by the actions described in this Opinion.

On the issue of costs, the Board has found that the awarding of costs is appropriate where: (1) the losing party's claim or position was wholly without merit; (2) the successfully challenged action was undertaken in bad faith; and (3) a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. See, AFSCME, District Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at p. 5, PERB Case No. 89-U-02 (1990). The Hearing Examiner did not recommend that the Board award costs in this matter. We adopt the Hearing Examiner's recommendation on this issue.

Pursuant to D.C. Code §1-605.02(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 addition noted above.

⁹(...continued)
were in prior to the reorganization after a significant lapse of time would be disruptive to
WASA's operations. Furthermore, we find that there is no evidence in this case that the results
of further bargaining would negate WASA's decision to reorganize.

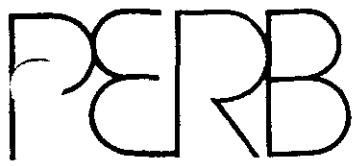
ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Water and Sewer Authority (WASA), 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 implement a reorganization.
2. The Board directs the parties to commence bargaining over the impact and effect of any issues that are still ripe or relevant to the above mentioned reorganization within (30) days of the issuance of this Opinion.
3. WASA shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. WASA 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. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

March 14, 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 WATER AND SEWER AUTHORITY (WASA), 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.702, PERB CASE NO. 00-U-12 (March 14, 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 American Federation of Government Employees, Local 872 concerning the impact and effects of a Reorganization by the conduct set forth in Slip Opinion No. 702.

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 Water and Sewer Authority

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.

March 14, 2003