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

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| In the Matter of: |) | |
| |) | |
| American Federation of Government Employees, Local 1000, |) | PERB Case Nos. 13-U-07 |
| |) | |
| Complainant, |) | |
| |) | Opinion No. 1578 |
| v. |) | |
| |) | |
| District of Columbia |) | |
| Department of Employment Services, |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

Complainant American Federation of Government Employees, Local 1000 (“AFGE Local 1000”) filed an unfair labor practice complaint against the District of Columbia Department of Employment Services (“DOES”) alleging that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a dress code policy (“2012 Dress Code”) without first engaging in substantive bargaining, and by failing to engage in good faith bargaining over the impact and effects of, and procedures concerning the implementation of the 2012 Dress Code (“I&E bargaining”).¹

On October 31, 2013, PERB issued a Decision and Order² (“Slip Op. No. 1434”) wherein the Board found that the parties’ pleadings presented issues of fact as to whether DOES had previously implemented a dress code in 1999 and whether the 2012 Dress Code was simply a revision of that 1999 dress code. Accordingly, the Board referred AFGE Local 1000’s Complaint to be analyzed by a hearing examiner. The Hearing Examiner’s Report and Recommendation (“Report”), now complete, is before the Board for consideration.

For the reasons stated more fully below, the Board rejects the Hearing Examiner’s conclusion that DOES’ implementation of the 2012 Dress Code without first engaging in substantive bargaining with AFGE Local 1000 violated D.C. Official Code §§ 1-617.04(a)(1)

¹ See *Am. Fed’n of Gov’t Emp., Local 631, et al. v. D.C. Gov’t, et al.*, 62 D.C. Reg. 14666, Slip Op. No. 1541, PERB Case No. 09-U-31 (2015).

² *Am. Fed’n of Gov’t Emp., Local 1000 v. D.C. Dep’t of Emp. Serv.*, 60 D.C. Reg. 16455, Slip Op. No. 1434, PERB Case No. 13-U-07 (2013).

and (5). Further, the Board rejects the Hearing Examiner's holding that DOES did not meet its statutory duty to engage in I&E bargaining over the 2012 Dress Code. Accordingly, AFGE Local 1000's Complaint is dismissed with prejudice.

I. Slip Op. No. 1434

In its Answer, DOES denied the Complaint's allegations and asserted that the 2012 Dress Code was not a new policy, but rather a revised policy that replaced a previous dress code that was implemented in 1999.³

AFGE Local 1000 thereafter filed a Motion for a Decision on the Pleadings, asserting that DOES had never implemented a dress code prior to the 2012 Dress Code.⁴ AFGE Local 1000 argued that although PERB had not yet, at that time, ruled on whether the implementation of a dress code is a mandatory subject of bargaining under the CMPA, other labor relations authorities—i.e. the National Labor Relations Board ("NLRB"), and the Federal Labor Relations Authority ("FLRA")—had determined that it is, and that that legal question superseded the parties' factual disputes.⁵ The Board disagreed.

In Slip Op. No. 1434, the Board found that it was inappropriate in management rights cases to consider precedent from the NLRB "because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights."⁶ Further, the Board noted that in one of the FLRA cases that AFGE Local 1000 cited, the FLRA held that changes to past practices must be bargained over, but it did not conclusively find that dress codes are themselves a mandatory subject of bargaining.⁷ Similarly, the Board noted that in another FLRA case cited by AFGE Local 1000, the FLRA determined that a union's proposal to make certain changes to an existing dress code was negotiable, but "[fell] short of providing definitive support that dress codes are mandatory subjects of bargaining."⁸

Therefore, in light of the factual disputes between the parties as to whether DOES had a dress code prior to the 2012 policy, and whether the parties ever engaged in impact and effects ("I&E") bargaining over the 2012 Dress Code, the Board referred the matter to be "processed through an unfair labor practice hearing to determine whether a past practice existed in which employees were not held to any particular dress code, and were not disciplined for their attire or appearance."⁹

³ Answer at 3.

⁴ *Id.*

⁵ *Id.* at 3-4.

⁶ *Id.* at 4.

⁷ *Id.* (citing *Veterans' Admin. West Los Angeles Med. Ctr.*, 23 FLRA 278 (1986)).

⁸ *Id.* at 5 (citing *U.S. Army, Aberdeen Proving Ground, Aberdeen Md.*, 32 FLRA 200 (1988)).

⁹ *Id.* at 6.

II. The Hearing Examiner's Report and Recommendation

The hearing in this matter was held on May 28, 2014, before Hearing Examiner Margaret Cox.¹⁰ However, Ms. Cox was unable to complete the Report and Recommendation. With the consent of the parties, PERB assigned Leonard Wagman to issue a Report and Recommendation based upon the hearing transcript and the documents in the existing record.¹¹ In his Report, Hearing Examiner Wagman made the following findings of facts and conclusions.

A. 1999 Dress Code

The Hearing Examiner found that DOES did not have a dress code prior to 2012.¹² Based on witness testimony and other documents in the record, the Hearing Examiner noted that although DOES issued a memorandum on July 26, 1999, to announce a new dress standards policy, it withdrew that policy in or about September 1999 after AFGE Local 1000 objected to its content and implementation.¹³ The Hearing Examiner found that no employees were ever disciplined under the 1999 dress code.¹⁴

B. 2012 Dress Code and Request to Bargain

On October 12, 2012, DOES issued Administrative Issuance No. 701, which contained the 2012 Dress Code.¹⁵

In his report, the Hearing Examiner found that the 2012 Dress Code set forth standards of professional business attire, regulated the wearing of clothing with DOES' logo, and established standards of appropriate attire for the "identification and safety of employees whose work exposes them to potential safety hazards."¹⁶ He found that the dress code prohibited the wearing of certain clothing and footwear while on duty, such as "athletic, casual, or beach wear."¹⁷ He found that the 2012 Dress Code listed numerous exceptions to those prohibitions, such as "casual Fridays," medical accommodations, attire worn to and from work and on lunch breaks, and other exceptions that were "in the interest of health, welfare, or safety of employees or customers, or in furtherance of the agency's business interest."¹⁸ The Hearing Examiner noted that additional exceptions could be granted with "prior supervisory approval," or "by DOES' Director, or his or her designee."¹⁹ The Hearing Examiner found that the 2012 Dress Code had a provision for enforcement, which warned that violations could result in "corrective or adverse action."²⁰ The Hearing Examiner also noted, however, that the 2012 Dress Code required management to

¹⁰ HE Report at 4.

¹¹ *Id.*

¹² *Id.* at 12.

¹³ *Id.* at 4-6.

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 9.

¹⁷ *Id.*

¹⁸ *Id.* at 9-10.

¹⁹ *Id.*

²⁰ *Id.* at 10.

enforce and apply its provisions with consistency and uniformity.²¹ Finally, the Hearing Examiner found that the 2012 Dress Code gave DOES' Director the sole discretion to "continue, revise, or revoke" its provisions.²²

On October 15, 2012, AFGE Local 1000 sent an email to DOES demanding bargaining over the policy.²³ The Hearing Examiner found, based on union witness Dawn Crawford's testimony, that AFGE Local 1000 intended to "engage in decisional bargaining" at the meeting.²⁴ However, based on the testimony of DOES' representative, Dean Aqui, the Hearing Examiner found that DOES only meant to engage in I&E bargaining,²⁵

The Hearing Examiner further found, based on the testimony of Mr. Aqui and Ms. Crawford, that AFGE Local 1000 was not prepared to discuss the 2012 Dress Code at the October 24th meeting, and so DOES requested another meeting to do so.²⁶ The Hearing Examiner did not credit the testimony of DOES witness Rahsaan Coefield, who testified that the parties did engage in I&E bargaining over the 2012 Dress Code at the October 24th meeting. The Hearing Examiner found that Mr. Coefield's testimony was contradictory.²⁷

Based on his factual findings, and citing to three NLRB cases and Slip Op. No. 1434,²⁸ the Hearing Examiner concluded that DOES had a regular and longstanding past practice "to refrain from enforcing a dress code on the bargaining unit of non-professional employees," and that accordingly, the absence of a dress code had become a term and condition of the bargaining unit's members' employment.²⁹ Thus, the Hearing Examiner held that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented the 2012 Dress Code without first substantively bargaining with AFGE Local 1000.³⁰

Further, the Hearing Examiner found that DOES' "insistence that its bargaining obligation regarding the impact and effects of its unilateral decision to implement its Employee Dress Standards is limited to a discussion is insufficient to satisfy its statutory obligation to bargain with the Union in good faith."³¹

²¹ *Id.*

²² *Id.*

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 11.

²⁷ *Id.*

²⁸ *NLRB v. Benne Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743, 747 (1962); *Mercy Hospital of Buffalo*, 311 NLRB 869 (1993); and *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

²⁹ HE Report at 14.

³⁰ *Id.* at 13-15.

³¹ *Id.* at 15.

III. Analysis

The Board will affirm a hearing examiner's findings and recommendations if the findings are reasonable, supported by the record, and consistent with PERB precedent.³²

A. Dress Code

The Board rejects the Hearing Examiner's finding that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented its 2012 Dress Code without first substantively bargaining with AFGE Local 1000 because that finding is contrary to the CMPA and PERB precedent, and is not supported by the record.³³

When the Board issued Slip Op. No. 1434 in October 2013, it noted that it had not yet ruled on whether the implementation of a dress code constituted a mandatory subject of bargaining under the CMPA.³⁴ However, three months later in January 2014, the Board issued *Am. Fed'n of Gov't Emp., Local 383 v. D.C. Dep't of Youth Rehab. Serv.*, 61 D.C. Reg. 1561, Slip Op. No. 1449, PERB Case No. 13-U-06 (2014) ("Slip Op. No. 1449"), wherein it noted that under D.C. Official Code § 1-617.08(a)(1), "management maintains the sole right to 'direct employees of the agencies,' 'in accordance with applicable laws, rules, and regulations.'"³⁵ Accordingly, the Board held that an agency does not violate D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing to engage in substantive bargaining with an exclusive representative over management decisions that are in harmony with the D.C. Municipal Regulations ("DCMR") (or other similar applicable law) because those decisions are protected as management rights under the "applicable laws and rules and regulations" clause of D.C. Official Code § 1-617.08(a)(1).³⁶ However, the Board also held that if the management decisions in question go beyond the scope of the DCMR or other applicable legal authority, then the decisions are not protected as management rights under the "in accordance with applicable laws and rules and regulations" clause of the statute, and cannot not be imposed without first engaging in substantive bargaining with the exclusive representative.³⁷

With regard to the specific question of whether the implementation of a dress code constitutes a mandatory subject of bargaining, the Board noted that 4 DCMR §§ 513.1-2³⁸ permit agencies to "prescribe standards of appearance or dress for personnel which serve a reasonable business purpose; for example, to identify its employees to the public by means of a distinctive

³² *Am. Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

³³ *Id.*

³⁴ See Slip Op. No. 1434 at 3-4.

³⁵ Slip Op. No. 1449 at 6-7, 9-10.

³⁶ *Id.* (citing *Washington Teachers Union, Local 6 v. D.C. Pub. Sch.*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995); and *Douglas, et al. v. Dixon, et al.*, 39 D.C. Reg. 9621, Slip Op. No. 315 at p. 2, PERB Case No. 92-U-03 (1992)).

³⁷ *Id.* at 8-9, 11.

³⁸ 4 DCMR §§ 513.1-2 falls under Title 4, Chapter 5 of the DCMR, which governs, respectively, "Human Rights and Relations" and "Employment Guidelines."

uniform, or to maintain a neat and clean appearance...., [or] to prevent a danger to the health, welfare, or safety of employees or customers....”³⁹ Accordingly, the Board held that the implementation of a dress code will be protected as a management right under D.C. Official Code § 1-617.08(a)(1)—and thus will not be a mandatory subject of bargaining—as long as the dress code’s provisions are consistent with the language and scope of the DCMR.⁴⁰ However, in cases where an agency’s dress code goes beyond the language and scope of the DCMR, then the Board held that the dress code “cannot be imposed without bargaining.”⁴¹

In this case, although the Hearing Examiner cited to the Board’s opinion in Slip Op. No. 1449, his analysis suggests that he read it to mean that even though the DCMR permits the District’s agencies to adopt a dress code, they cannot do so unless they first substantively bargain over its provisions with the exclusive representative regardless of whether or not the dress code’s provisions are within the scope of the regulations.⁴² That interpretation was in error. The operative language in Slip Op. No. 1449 states:

4 DCMR §§ 513.1 and 513.2 clearly permit agencies to maintain a dress code for their employees. However, the detailed provisions in [an agency’s] dress code policy *may* extend beyond the language of the DCMR and thus cannot be imposed without bargaining.⁴³

The word “may” in the quoted language, especially when read in conjunction with the Board’s other holdings in Slip Op. No. 1449, makes it clear that the Board actually held that agencies are only obligated to bargain substantively with the exclusive representative over a dress code *if* the dress code’s requirements go beyond the scope of 4 DCMR §§ 513.1-2.⁴⁴ However, if the dress code stays within the scope of the regulations, then the agency only has an obligation, upon a timely request by the union, to engage in good faith I&E bargaining over the dress code.⁴⁵ Accordingly, it was irrelevant whether or not DOES had a dress code prior to 2012 because 4 DCMR §§ 513.1-2 permitted it to create one whether it already had one in place or not. Accordingly, the only question the Hearing Examiner needed to answer in this matter was whether DOES’ 2012 Dress Code, new or not, exceeded the scope of 4 DCMR §§ 513.1-2.⁴⁶ The record shows that the Hearing Examiner did not answer that question.

Instead, the Hearing Examiner erroneously applied a past practice analysis in which he relied almost exclusively on NLRB case law to support his conclusions.⁴⁷ Additionally, the Hearing Examiner erroneously found that DOES’ duty to substantively bargain with AFGE Local 1000 over the 2012 Dress Code is “defined in Section 8(d) of the National Labor Relations

³⁹ Slip Op. No. 1449 at 8-9.

⁴⁰ *Id.* at 6-10.

⁴¹ *Id.* at 8-9.

⁴² *See* HE Report at 14-15.

⁴³ Slip Op. No. 1449 at 8-9 (emphasis added).

⁴⁴ *Id.*

⁴⁵ *Id.* at 7, 10; *see also* PERB Rule 520.11.

⁴⁶ Slip Op. No. 1449 at 8-9.

⁴⁷ *See* HE Report at 13-14.

Act” (“NLRA”).⁴⁸ The Board has long held that although it “may often cite NLRB case law, the PERB is not bound by NLRB precedent.”⁴⁹ This is partly because PERB and the NLRB operate under different statutes. PERB operates under the CMPA, while the NLRB operates under the NLRA. The two statutes are similar in many respects, but differ in one key aspect that is directly relevant to this case; the CMPA has a management rights statute (encapsulated in D.C. Official Code § 1-617.08, *et seq.*), whereas the NLRA does not.⁵⁰ Indeed, the Board expressly stated in Slip Op. No. 1434 that it is not appropriate in this case to consider precedent from the NLRB “because the National Labor Relations Act has no parallel to the CMPA’s statutory grant of management rights.”⁵¹ Accordingly, the Hearing Examiner’s almost exclusive reliance on NLRB case law in his analysis of DOES’ 2012 Dress Code, and the conclusions he made based on that analysis, were contrary to the CMPA and PERB precedent.⁵²

Furthermore, the record shows that AFGE Local 1000 failed to prove, by a preponderance of the evidence, that some or all of the provisions in DOES’ 2012 Dress Code exceeded the scope of 4 DCMR §§ 513.1-2.

Under PERB Rule 520.11, “[t]he party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.”

Two possible ways that a complainant can prove that an agency’s dress code exceeds the scope of the DCMR are to: (1) show that the dress code was unjustifiably discriminatory toward the bargaining unit on one or more of the bases described in the District’s Human Rights Act (“DCHRA”),⁵³ and/or (2) show that the dress code did not serve any of the reasonable business purposes contemplated in 4 DCMR §§ 513.1-2.⁵⁴

In this case, the record shows that AFGE Local 1000 did not assert in its Complaint, at the hearing, or in its post-hearing brief, that the 2012 Dress Code was in any way discriminatory. If AFGE Local 1000 had shown, by testimonial or documentary evidence, that any of the provisions of DOES’ dress code discriminated against a certain class of bargaining unit members in one or more of the manners described in the DCHRA, then under D.C. Official Code § 2-1401.03(a) and 4 DCMR § 513.3, the burden would have shifted to DOES to prove that the alleged discriminatory provisions served a business necessity.⁵⁵ However, AFGE Local 1000 did

⁴⁸ *Id.* at 13 (citing to 29 U.S.C. § 158(d)).

⁴⁹ *Bennett, et al v. Int’l Ass’n. of Firefighters, Local 36 and Fire and Emergency Serv. Dep’t.*, 47 D.C. Reg. 10092, Slip Op. No. 445 at p. 2, PERB Case No. 95-RD-01 (1995); *see also Fraternal Order of Police/Metropolitan Police Dep’t Labor Comm. v. D.C. Metropolitan Police Dep’t*, Slip Op. No. 1526 at p. 8, PERB Case Nos. 06-U-23, et al. (June 26, 2015) (holding that while the Board does “sometimes look to NLRB precedent for guidance when relevant, it mostly does so when PERB’s case law is silent on a particular issue”).

⁵⁰ *See* Slip Op. No. 1434 at p. 4.

⁵¹ *Id.*

⁵² *See AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.

⁵³ D.C. Official Code §§ 2-1404.01 *et seq.*

⁵⁴ *Am. Fed’n of Gov’t Emp., Local 383 v. D.C. Dep’t of Youth Rehab. Serv.*, Slip Op. No. 1577 at p. 13, PERB Case No. 13-U-06 (June 9, 2016).

⁵⁵ The Board notes that when an asserting party demonstrates that a dress code is discriminatory under the DCHRA, 4 DCMR § 513.3 states that the agency must merely “show” that the alleged discriminatory provision serves a

not assert or make any showing that the 2012 dress code was discriminatory in any way toward the bargaining unit. Therefore, under PERB Rule 520.11, the burden to prove that the dress code exceeded the scope of the DCMR in other ways remained with AFGE Local 1000.

The record shows that AFGE Local 1000 also did not provide any testimonial or documentary evidence at the hearing or in its post-hearing brief to prove that the 2012 Dress Code, in whole or in part, exceeded the scope of the reasonable business purposes contemplated in 4 DCMR §§ 513.1-2.

Rather, in its post-hearing brief, AFGE Local 1000 argued that DOES' implementation of the 2012 Dress Code violated its established past practice of not having or enforcing a dress code.⁵⁶ To support that assertion, AFGE Local 1000 cited to various NLRB and FLRA cases.⁵⁷ As already discussed, *supra*, the Board has determined that it is not appropriate in this case to consider precedent from the NLRB "because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights."⁵⁸ Furthermore, although the Federal Service Labor-Management Relations Statute ("Federal Service Statute")⁵⁹ has a management rights provision similar to that of the CMPA,⁶⁰ and even though the FLRA has found that dress codes under that statute generally constitute a mandatory subject of bargaining,⁶¹ the Board finds that it was not necessary to look to those sources for guidance in this case because PERB already had an established precedent on whether dress codes constitute a mandatory subject of bargaining under the CMPA.⁶² As discussed, *supra*, when the Board issued Slip Op. No. 1434 in October 2013, it stated that it had not yet ruled on whether or not a dress code constitutes a mandatory subject of bargaining under the CMPA. However, the Board's subsequent Decision in Slip Op. No. 1449, issued in January 2014, found that dress codes are not a mandatory subject of bargaining under the CMPA as long as the dress code's provisions do not extend beyond the scope and language of 4 DCMR §§ 513.1-2. Accordingly, Slip Op. No. 1449 supplanted Slip

"reasonable business purpose" in order to survive scrutiny. However, D.C. Official Code § 2-1401.03(a) goes further and states that the respondent must "prove" that the discriminatory provision is justified by "business necessity." In other words, the respondent must prove, under the specific facts of that individual case, that its business cannot be conducted without the discriminatory provision. The statute further provides that "a 'business necessity' exception cannot be justified by the facts of increased costs to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person." Since statutes control over regulations, it is the statutory language that governs what respondents must prove if the burden shifts to them upon a showing by the complainant that a dress code is discriminatory. In this case, however, AFGE Local 1000 did not assert or show that the 2012 Dress Code was in any way discriminatory, so the burden of proof did not shift to DOES.

⁵⁶ AFGE Local 1000 Post-Hearing Brief at 8.

⁵⁷ *Id.* at 8-11 (internal citations omitted).

⁵⁸ See Slip Op. No. 1434 at p. 4.

⁵⁹ 5 U.S.C. §§ 7101-7135.

⁶⁰ *Id.* at § 7106.

⁶¹ See, e.g., *Dep't of Homeland Security and Nat'l Treasury Emp. Union*, 62 FLRA 236 (2007) (holding that generally, employee attire is a condition of employment and, therefore, negotiable as to substance).

⁶² See *Am. Fed'n of Gov't Emp., Local 2741 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 8, PERB Case No. 00-U-22 (2002) (holding that PERB looks to other the decisions of other labor relations authorities only when its own precedent is silent on the issue in question).

Op. No. 1434 and became the Board's ruling precedent on this issue under the CMPA. The vital distinction between the Federal Service Statute and the CMPA is that the federal government does not have a universally applicable regulation comparable to 4 DCMR §§ 513.1-2 that permits its agencies to implement a dress code. Rather, that decision is left to each federal agency to determine for itself. Accordingly, although it may be appropriate to engage in a past practice analysis in a dress code case before the FLRA, it is not appropriate to do so in a dress code case before PERB unless it is first shown that the dress code exceeds the scope of the DCMR.⁶³

AFGE Local 1000 further argued in its post-hearing brief that:

[T]he Agency has never presented any concrete reason for the sudden imposition of a dress code after at least 20 years without one. DOES has never maintained that employees were not dressing appropriately; nor has it ever suggested that employees' dress or appearance is integral to the mission of DOES. There is no evidence on the record to suggest that regulating employee dress is necessary or crucial to promote the efficiency of the Agency. Indeed, the policy allows for "Casual Friday". Joint Ex. 3. The Agency has offered no explanation as to why its operational needs are any different on Fridays than any other work day. But this exception for one day of the week does suggest that employee attire is not an integral part of fulfilling the Agency's mission.⁶⁴

As already discussed, *supra*, since AFGE Local 1000 made no showing that some or all of the 2012 Dress Code's provisions were in any way discriminatory, DOES did not have the burden of proof in this case. Rather, the burden was on AFGE Local 1000, as the party asserting that DOES committed an unfair labor practice by failing to bargain substantively over its dress code prior to implementing it, to prove that the 2012 Dress Code exceeded the DCMR and was therefore a mandatory subject of bargaining.⁶⁵ Accordingly, DOES did not have any obligation in this matter to show why its 2012 Dress Code was necessary, or why it had a "Casual Friday" exception.

Furthermore, DOES had no obligation to show that the dress code served a business necessity.⁶⁶ Instead, the burden was on AFGE Local 1000 to prove that the dress code did not serve any of the reasonable business purposes contemplated in 4 DCMR §§ 513.1-2, such as identifying DOES' employees to the public by means of a distinctive uniform, maintaining a neat and clean appearance, or preventing a danger to the health, welfare, or safety of DOES' employees or customers. If AFGE Local 1000 had called any witnesses or provided any

⁶³ See Slip Op. No. 1449 at 8-9.

⁶⁴ AFGE Local 1000 Post-Hearing Brief at 12.

⁶⁵ See PERB Rule 520.11.

⁶⁶ See D.C. Official Code § 2-1401.03(a); and 4 DCMR § 513.3.

documentary evidence to show that the 2012 Dress Code did not serve any of those purposes, and/or to show that the dress code was not tailored to accomplish those purposes, then the Board may have been able to find that the 2012 Dress Code was outside the scope of the DCMR, and that DOES committed an unfair labor practice when it implemented the changes without first substantively bargaining with AFGE Local 383. But as the record sits, there is not enough evidence for the Board to reasonably make any of those conclusions.

Accordingly, the Board rejects the Hearing Examiner's conclusion that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented the 2012 Dress Code without first substantively bargaining with AFGE Local 1000.⁶⁷ Additionally, the Board finds that AFGE Local 1000 did not meet its burden, under PERB Rule 520.11, to prove by a preponderance of the evidence that DOES had a duty to bargain substantively over its 2012 Dress Code, or that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it failed to engage in substantive bargaining with AFGE Local 1000 prior to the dress code's implementation.⁶⁸ Accordingly, AFGE Local 1000's allegation is dismissed with prejudice.

B. I&E Bargaining

The Board rejects the Hearing Examiner's finding that DOES' "insistence that its bargaining obligation regarding the impact and effects of its unilateral decision to implement its Employee Dress Standards [was] limited to a discussion [was] insufficient to satisfy its statutory obligation to bargain with the Union in good faith."⁶⁹ The Hearing Examiner's finding is not supported by the record, and is contrary to PERB precedent.⁷⁰

In his Report, the Hearing Examiner found that after AFGE Local 1000 demanded bargaining over DOES' 2012 Dress Code, it was DOES' attorney, Mr. Aqui, who set up the October 24, 2012 bargaining meeting with AFGE Local 1000.⁷¹ The Hearing Examiner further noted, based on testimony both agency and union witnesses, that AFGE Local 1000 "was not ready to discuss the Dress Standards Policy on October 24 and sought another meeting to do so."⁷² However, no meeting was ever scheduled.⁷³ The Hearing Examiner found that it was "clear... that DOES has had no intention of bargaining with the Union about the decision to impose the Employee Dress Code on the unit of employees covered by the CBA," and that

⁶⁷ HE Report at 13-15.

⁶⁸ The Board notes that this decision should not be interpreted to mean that DOES' 2012 Dress Code was within the scope of the DCMR, or that it was protected as a management right. Rather, the Board is merely saying AFGE Local 1000 simply did not raise any specific allegations or concerns about any of the dress code's particular requirements other than to question its "Casual Friday" exception, and even then AFGE Local 1000 failed to provide any documentary or testimonial evidence to establish that that provision exceeded the scope of the DCMR. Accordingly, the Board was bound to make its decision based on the record that was before it. *See* PERB Rule 520.14. Had additional arguments been made, or had additional facts been established by either party, then it is possible, and perhaps even likely, that the outcome in this matter would have been different.

⁶⁹ HE Report at 15.

⁷⁰ *See AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.

⁷¹ HE Report at 10.

⁷² *Id.* at 11.

⁷³ *Id.* at 12.

DOES “holds the view that impact and effects bargaining ‘can be discussed and an agreement reached with the unions’ but that such discussion would not lead to any change in that policy.”⁷⁴ Thus, the Hearing Examiner concluded that DOES failed to meet its statutory duty to bargain in good faith with AFGE Local 1000 over the 2012 Dress Code.⁷⁵

When an agency implements a management rights decision that is protected by D.C. Official Code §§ 1-617.08(a) *et seq.*, the agency is not obligated to bargain substantively over the decision, but it still has a duty to, upon a timely request from the union, bargain over the impact and effects of, and procedures concerning the implementation of the decision.⁷⁶ That duty does not require the parties to bargain in perpetuity or to reach an ultimate agreement, but the agency must still engage in the negotiations in good faith.⁷⁷ The Board has set forth what constitutes “good faith” in the context of I&E bargaining:

Under Board case law, when I&E bargaining has been requested by the exclusive representative, the agency fulfills its duty to bargain in good faith by going beyond “simply discussing” its proposal with the union, and by doing more than merely requesting the union’s input. Furthermore, the agency’s participation cannot constitute mere “surface bargaining”, and the agency cannot engage in conduct at or away from the table that intentionally frustrates or avoids mutual agreement. Rather, there must be a give and take, with the negotiations entailing full and unabridged opportunities by both parties to advance, exchange, and reject specific proposals.⁷⁸

In this case, the record shows that DOES made every reasonable effort to engage in good faith I&E bargaining with AFGE Local 1000 over its 2012 Dress Code. Indeed, when AFGE Local 1000 requested bargaining, it was DOES that scheduled the meeting.⁷⁹ DOES’ witness, Mr. Aqui, whose testimony the Hearing Examiner credited,⁸⁰ testified that DOES arrived at the meeting fully prepared to engage in I&E bargaining, but that the meeting was cut short because AFGE Local 1000’s representatives stated that they had not yet received feedback from their members and were therefore not prepared to discuss the dress code.⁸¹ Mr. Aqui testified that he told AFGE Local 1000’s representatives that DOES would wait for AFGE Local 1000’s

⁷⁴ *Id.* at 11.

⁷⁵ *Id.* at 15.

⁷⁶ See *AFGE, Local 631, et al. v. D.C. Gov’t, et al.*, 62 D.C. Reg. 14666, Slip Op. No. 1541 at p. 5, PERB Case No. 09-U-31; see also *Am Fed’n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2401, AFL-CIO v. D.C. Child and Family Serv. Agency*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06 (2014); and *Am. Fed’n of Gov’t Emp., Local 631 v. D.C. Pub. Emp. Relations Bd.*, Case No. 2013 CA 005870 P(MPA) (D.C. Super. Ct. Jul. 30, 2015).

⁷⁷ *AFSCME, Dist. Council 20, Local 2401, AFL-CIO v. DC CFSA*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06.

⁷⁸ *Id.* (internal citations omitted).

⁷⁹ HE Report at 10.

⁸⁰ *Id.* at 11.

⁸¹ *Id.*; see also Transcript at 103-104.

“additional comments and demands for I&E on those issues,” but that AFGE Local 1000 never made any additional demands and never requested another meeting.⁸² Instead, AFGE Local 1000 filed the instant unfair labor practice complaint.

Based on these facts, the Board finds that the Hearing Examiner’s assertion that DOES’ efforts were “insufficient to satisfy its statutory obligation to bargain with the Union in good faith” is not supported by the record, and is not consistent with PERB precedent.⁸³ Furthermore, the Board finds that the Hearing Examiner’s conclusion that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by failing and refusing to bargain with AFGE Local 1000 over its 2012 Dress Code is likewise not supported by the record, or consistent with PERB precedent. Accordingly, the Board rejects the Hearing Examiner’s conclusions and dismisses AFGE Local 1000’s allegations.⁸⁴

IV. Conclusion

Based on the foregoing, the Board rejects the Hearing Examiner’s conclusion that DOES’ implementation of the 2012 Dress Code without first engaging in substantive bargaining with AFGE Local 1000 violated D.C. Official Code §§ 1-617.04(a)(1) and (5). Further, the Board rejects the Hearing Examiner’s finding that DOES failed to meet its statutory duty to engage in good faith I&E bargaining with AFGE Local 1000 over the 2012 Dress Code. Accordingly, AFGE Local 1000’s Complaint is dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFGE Local 1000’s Complaint is dismissed with prejudice; and
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 Yvonne Dixon, Ann Hoffman, Barbara Somson, and Douglas Warshof.

April 21, 2016
Washington, D.C.

⁸² Transcript at 104; *see also* HE Report at 12.

⁸³ HE Report at 15; *see also* *AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.

⁸⁴ *See AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-07, Op. No. 1578 was sent by File and ServeXpress to the following parties on this the 9th day of June, 2016.

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PERB