

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:)	
)	
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES,)	PERB Case No. 02-U-16
LOCAL 383,)	
)	
)	
)	Opinion No. 753
)	
)	
Complainant,)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
DEPARTMENT OF MENTAL HEALTH,)	
)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 383 ("Complainant", "Union" or "AFGE"), alleging that the District of Columbia Department of Mental Health ("Respondent", "Agency" or "DMH") violated D.C. Code §1-617.04 (a)(1) and(5) (2001 ed.)¹. Specifically, it is alleged that DMH committed an unfair labor practice (ULP) by failing to bargain, upon request, over the impact and effects of changes to employees' working conditions, including hours of work, shift schedules, and policies concerning use of personal vehicles to perform work related duties. In addition, it is alleged that the Respondent announced and implemented unilateral changes to matters affecting mandatory subjects of bargaining.

¹In this Decision and Order, all references to the D.C. Code refer to the 2001 edition, unless noted otherwise.

The Respondent denies the allegations. The Respondent claims that the Management Rights provisions of the Comprehensive Merit Personnel Act² (CMPA) authorize it to take the actions that it did. Namely, DMH contends that pursuant to D.C. §1-617.08 (a)(5), it exercised its right to: (1) provide mental health care which complied with the Mental Health standards required pursuant to the Mental Health Rehabilitation Services Standards (MHRS), and, *inter alia*, (2) determine the Agency's mission, budget, organization, as well as the number, type, grade, position, and tour of duty held by employees in order to ensure the efficient operation of the Department. Additionally, the Agency contends that the present case should be dismissed because: (1) it failed to state a claim upon which PERB could grant relief; (2) the Agency has not implemented any changes which violate any statute, nor are they inconsistent with the collective bargaining agreement (cba); and (3) the matter was not the appropriate subject for a ULP, but rather should be addressed through collective bargaining negotiations. Also, the Agency denies that the Union was not given advance notice of the changes.

A hearing was held and the Hearing Examiner issued a Report and Recommendation (R&R). The Hearing Examiner found that the Respondent violated D.C. Code §1-617.04 (a)(1) and (5).³ Specifically, the Hearing Examiner found that these changes involved decisions that were made pursuant to management rights; therefore, the Agency was required to engage in impact and effects bargaining upon request.⁴ As a result, she recommended that the Board: (1) issue an order directing

² D.C. Code § 1-617.08(a)(5) (2001 ed.) provides, *inter alia*, that management has the right to determine the Agency's mission, budget, organization, as well as the number, type, grade, position, and tour of duty held by employees.

³ A threshold issue was raised concerning whether the Board has jurisdiction to hear a complaint filed by a Union that has joint certification where the "companion" union that shares the certification is *not* joined in the case as a party. AFGE, Local 383 shares a joint certification with AFSCME, Local 2095; however, AFSCME, Local 2095 is not joined as a party in this matter. The Hearing Examiner found that both jointly certified unions do not have the same issues, concerns, and circumstances, because they were not treated the same way by the Respondent. As a result, the Hearing Examiner found that joinder by AFSCME, Local 2095 is not required for AFGE to proceed with the present Complaint. The Hearing Examiner also noted that the Respondent did not provide any authority or documentation to support its claim that a joinder is a necessary element for filing the ULP in the present case. The Board concludes that the Hearing Examiner's finding on this issue is reasonable and supported by the record. As a result, we adopt the Hearing Examiner's finding on this threshold issue.

⁴ The Board has held that it is well settled that management has certain statutory rights that it may exercise at its discretion. See, 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) and American Federation of Government Employees, Local 872 v. D.C. Water

the parties to immediately engage in impact and effects bargaining on an expedited schedule, to the extent that any impact can be ameliorated; (2) order the Respondent to post a notice that it committed an unfair labor practice; and (3) award costs to the Complainants. Furthermore, the Hearing Examiner recommended that the Board retain jurisdiction in this matter while the parties are engaged in bargaining. The Hearing Examiner also noted that there *may* be some compensation issues to be resolved in the matter concerning the alleged non-payment of employees for overtime and on-call status.⁵

The Complainant filed limited Exceptions concerning the Hearing Examiner's R & R. The Hearing Examiner's R&R and the AFGE's exceptions are before the Board for disposition

Facts:

This dispute arose out of actions which occurred at the Department of Mental Health (DMH), an Agency which was formerly under Receivership and known as the Commission on Mental Health Services. Specifically, in November 2001, DMH issued regulations pursuant to a March 28, 2001 court ordered plan and the Mental Health Service Delivery Reform Act of 2001. These regulations contained standards that were required to be met by all DMH-certified mental health rehabilitation service providers. (R & R at pg. 2). The regulations, known as the Mental Health Rehabilitation Standards (MHRS), required the DMH Community Service Agency (CSA) to implement various changes in its operations in order to meet the newly imposed certification standards. Several of the required changes directly affected employees who were members of AFGE. Two significant changes were that CSA employees were to provide extended hours and be on-call more than usual. As a

and Sewer Authority, DCR, Slip Op. No. 702, PERB Case No. 00-U-12 (2003). 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. See, Id.

⁵ In her Report and Recommendation, the Hearing Examiner states the following:

Perhaps PERB should retain jurisdiction in this matter while the parties engage in bargaining. It appears (that) there *may* be some compensation issues to be resolved in the matter of the alleged non payment of employees for overtime and on-call status. (R & R at pg. 31).

Since the Hearing Examiner made no specific findings on the issue of the alleged non-payment of overtime and on-call status, the Board will not address the matter concerning the alleged non-payment of overtime and on-call status in this Decision and Order.

result, employees would be required to provide 24 hour on-call services, 7 days a week. Respondent, DMH, met with various union representatives on an individual basis to discuss changes that the new regulations would impose on CSA and its employees. The Complainant's companion Union, AFSCME, Local 2095, was invited to a January 15, 2002 meeting, but the Complainant was not. However, one of AFGE's shop stewards, learned of the meeting with AFSCME, Local 2095, and attended it despite the fact that AFGE was not invited.

On March 14, 2002, a follow-up meeting, convened by the CSA's Chief Executive Officer and other Agency managers, was held with representatives of various unions in attendance. The March 14th gathering, referred to as the "Consultation Meeting with Labor Leadership", was attended by AFGE's President, Johnny Walker, Shop Steward Rosalyn Williams and Sheila Wiggins Williams. Proposed changes were announced at this meeting.

On March 19, 2004, DMH sent correspondence to the Unions notifying them that their comments at the March 14th meeting had been taken under advisement. (R & R at 4). The correspondence also solicited information concerning "the impact the (proposed) changes will have on your members, along with suggested resolutions to each impacted area identified." (R & R at pg. 4). The Unions were given three days to respond. On March 22, 2004, the same day that the Unions' responses were due, DMH issued a letter to Union leaders identifying changes that would be made to employees' work schedules, effective May 1, 2002. Nate Nelson, an AFGE National Representative, requested to bargain over the impact and effects of the proposed changes by letter dated April 18, 2002. DMH did not respond to Mr. Nelson's request until June 4, 2002.

DMH's Human Resources Director responded to AFGE's Local President and informed him that he had missed the March 22nd deadline for submitting comments and offered him another opportunity to contribute to the changes at CSA. DMH's Human Resource Director offered to meet from 10:00 a.m.-12:00 Noon on Thursday, June 10th to discuss the matter. However, Mr. Walker did not attend the meeting.

On July 16, 2002, National Representative Nate Nelson made a second demand to bargain over the impact and implementation of changes in working conditions. On July 25th, DMH's Human Resources Director acknowledged that they had demanded impact and effects bargaining, but denied that the Agency had made unilateral changes to the working conditions of AFGE members. She explained that all changes were mandated by the MHSDA and the Court Ordered plan pursuant to the Dixon v. Williams case, CA No. 74-285. The Respondent also indicated that it was "amenable to giving you (the Union) yet another opportunity to discuss the matter", if AFGE was willing to hold the ULP hearing scheduled for August 28, 2002 in abeyance. (See, R & R at pgs. 2-5).

As a result of DMH's alleged failure to bargain over the impact and effects of these changes, AFGE filed this complaint.

The Hearing Examiner's Report and Recommendations and AFGE's Limited Exception:

Based on the pleadings, the record developed in the hearing and the parties' post hearing briefs, the Hearing Examiner identified the following issue and addressed the following sub-issues in this case:

1. *Whether the Respondent violated the CMPA by failing to bargain over the impact and effects of its changes to: (1) hours of work; (2) on-call policy; and (3) policy concerning use of personal vehicles ?*
 - A. *Did the Respondent provide sufficient prior notice and ample opportunity to bargain over the impact and effects of the operational changes within the CSA?*
 - B. *Did the Complainant fail to properly request (or engage in) impact and effects bargaining on behalf of its members?*

The Hearing Examiner determined that the Respondent violated the CMPA by failing to bargain over the impact and effects of its changes in the hours of work, on call policy and policy concerning the use of personal vehicles to perform work related duties. Relying on Board precedent, the Hearing Examiner noted that management's rights under D.C. Code §1-617.08 (a), do not relieve an Agency of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning the implementation of these management right decisions. See, American Federation of Government Employees, Local No. 383, AFL-CIO v. District of Columbia Department of Human Services, 49 DCR 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002). Thus, the Hearing Examiner determined that while the Agency in the present case may have "had a managerial right to implement operational changes in order to comply with the statute," there was also an obligation to bargain with the Union regarding the impact and effects of those changes. (R & R at p. 19). 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 and 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) (R & R at pg. 21).

Although the Hearing Examiner found that the Agency had given sufficient notice of the proposed operational changes before they were implemented, she also found that DMH did *not* provide an ample *opportunity to bargain* over the impact and effects of these changes. Based on the facts in the record, the Hearing Examiner was persuaded that DMH gave the Union the opportunity to give “input”, “discuss”, and did in fact “request input” concerning the impact and effects of the changes. (R & R at pg. 20). However, the Hearing Examiner relied on the Board’s precedent in several cases which support the proposition that meeting with the Union to receive its “input” is not sufficient to fulfill the duty and meet the standard for bargaining over the impact of a management right. ⁶ 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); See also, Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). See also, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case No. 00-U-36 and 40 (2002). As a result, she concluded that the Respondent in the instant case had a statutory duty under D.C. Code §1-617.04(a)(5) to schedule and conduct an individualized meeting with Unions for impact and effects bargaining and did not do so. Therefore, she concluded that DMH had committed an unfair labor practice. (R & R at pg. 22)

In response to DMH’s claim that AFGE failed to properly request (or engage in⁷) impact bargaining on behalf of its members, the Hearing Examiner was not persuaded by DMH’s assertion. Instead, the Hearing Examiner found that AFGE made several oral and written requests to bargain over the impact and effects of the changes, but was only offered the opportunity to “give input” or “consult” concerning the changes. Since the Hearing Examiner found that a request was made, but no opportunity to bargain was provided, she found that DMH committed an unfair labor practice by violating its duty to bargain in good faith pursuant to the CMPA.

⁶ As noted earlier, the Hearing Examiner found that an opportunity to “consult” or “give input” is *not* sufficient for the Agency to meet its bargaining obligation pursuant to Board precedent See, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case Nos.00-U-36 and 40 (2002). It is also well established that the duty to bargain in good faith is not satisfied by the agency “requesting input” from the union or “simply discussing” the impact and effect. See, Id.

⁷On one occasion, the record reflects that DMH’s Human Resources Director invited the Union’s representative to meet and discuss the changes at a time that was not convenient for the Union representative. Therefore, the representative did not attend. The invitation was to “meet and discuss,” however, not to bargain.

No exceptions were filed concerning the Hearing Examiner's finding that an unfair labor practice was committed. However, the Union filed limited exceptions seeking to have the Hearing Examiner's remedy modified to include *status quo ante relief*, which the Union had originally requested.

Based on the foregoing, the Board finds that the Hearing Examiner's findings are reasonable, supported by the record, and consistent with Board precedent. The Board's precedent is clear that an Agency has the duty to bargain over the impact and effects of a management rights decision, where there is a request to do so. 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 and International Brotherhood of Police Officers, Local 446, MPA 92-12 (1993). We find that the record supports the Hearing Examiner's conclusion that a request to bargain was made and the Agency did not engage in impact bargaining with AFGE. As a result, we adopt the Hearing Examiner's factual findings and ultimate determination that DMH committed an unfair labor practice in violation of the CMPA.

IX. Remedy

The Hearing Examiner found that the appropriate remedy would include: (1) posting a Notice describing the ULP; (2) ordering that the parties engage in impact bargaining on an expedited basis, "*to the extent that any impact can be ameliorated*"; and (3) awarding costs. (R & R at pg. 31)

As noted earlier, the Union filed limited exceptions seeking to have the Hearing Examiner's remedy modified to include *status quo ante relief*, which the Union had originally requested.

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 at pg. 10, 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 and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id. As a result, we believe that the Hearing Examiner's suggested relief is appropriate.

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: (1) the rescission of the management decision would disrupt or impair the Agency's operations; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. Id.

In view of the above, we conclude that *status quo ante* relief is *not* appropriate in the present case. Specifically, we believe that returning the employees to the position they were in before the changes would be disruptive to DMH's operations. This is especially true in this case because the changes were made pursuant to law and mandatory regulations governing Mental Health facilities several years ago. Furthermore, we find *no* evidence that the results of further bargaining would negate DMH's decision to make the changes to work schedules and other policies noted in the record. As a result, the Board rejects the Complainant's Exceptions and request for *status quo ante* relief.

The Board has held that where there has been a significant passage of time after an Agency has implemented its changes without bargaining, impact and effects bargaining should be limited to only those subjects that are still *ripe*. See, International Brotherhood of Police Officers v. D.C. Office of Property Management, ___ DCR ___, Slip Op. No. 704, PERB Case No. 01-U-03 (2003).

Therefore, we adopt the Hearing Examiner's finding that bargaining should be limited to those issues that are not deemed *moot* by the passage of time.⁸ Therefore, we order the parties to bargain over those issues that are not moot.

With respect to reasonable costs, the Board has ruled that an award of costs must be in the interest of justice. The Board has awarded costs when it determines that: (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, PERB Case No. 89-U-02, Slip Op. No. 245. The Hearing Examiner did not provide a detailed explanation for why costs should be awarded in her decision. However, in this case, we believe that the losing party's position was wholly without merit. The record is clear that the Agency invited the Union to meet and discuss the issues in dispute, not to bargain. As noted earlier, the Board's precedent is clear that meeting to give input and discussing is not tantamount to bargaining over the impact and

⁸The Hearing Examiner's Report did not provide an explanation for what was meant by "bargaining should be limited to those issues where the impact can be ameliorated." (R & R at pg. 31. However, we find that the Hearing Examiner's decision could be interpreted as ordering bargaining only on those issues that are *ripe* for impact bargaining. Stated another way, the Hearing Examiner is recommending that the Board direct the parties to negotiate over issues that have not been deemed *moot* by the passage of time. This interpretation is consistent with our holding in International Brotherhood of Police Officers v. D.C. Office of Property Management, ___ DCR ___, Slip Op. No. 704, PERB Case No. 01-U-03 (2003). Therefore, we believe that the Hearing Examiner's recommended remedy is reasonable and consistent with Board precedent.

effects of an issue. 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); See also, Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). See also, Fraternal Order of Police/DOC Labor Committee v. Department of Corrections, 49 DCR 8937, Slip Op. No. 679, PERB Case No. 00-U-36 and 40 (2002). As a result, we find that the Board's standard for awarding costs has been met. Therefore, we concur with the Hearing Examiner's finding that the costs should be awarded in this case.

Pursuant to D.C. Code §1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's findings and conclusion that DMH violated D.C. Code §1-617.04(a)(1) and(5) by failing to bargain over the impact and effects of changes to employees' working conditions after AFGE made a request to bargain. In addition, we find that the Hearing Examiner's recommended remedy will achieve the goals for awarding remedies, as outlined in the CMPA and the relevant Board precedent. As a result, we adopt the Hearing Examiner's recommended relief, including an Order directing DMH to reimburse the Complainant for reasonable costs. .

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Mental Health(DMH), its agents and representatives, shall cease and desist from violating D.C. Code §1-617.04(a)(1) and (5) (2001 ed.), by failing to bargain, upon request, over the impact and effects of changes to employees' hours of work, shift schedules, and policies concerning use of personal vehicles to perform work related duties .
2. DMH and the American Federation of Government Employees, Local 383 (AFGE) shall within thirty (30) days of the issuance of this Opinion, commence bargaining over the impact and effects of any issues that are still *ripe* or relevant to DMH's decision to make changes to employees hours of work, shift schedules, and policies concerning use of personal vehicles.
3. DMH shall post conspicuously within ten (10) days from the service of this Decision and Order the attached Notice. The Notice shall be posted where notices to employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
4. DMH 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 (40) days of the date of this Order, DMH 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. The Complainant shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of actual costs incurred processing this action. The statement of costs shall be filed together with supporting documentation. DMH may file a response to the statement of costs within fourteen (14) days from service of the statement upon it.
7. DMH shall pay AFGE reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.
8. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

October 15, 2004.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.02-U-16 was transmitted via Fax and U.S. Mail to the following parties on this the 15th day on October 2004.

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Certificate of Services
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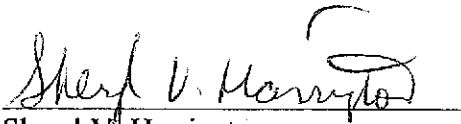
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH (DMH), 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. 753, PERB CASE NO. 02-U-16 (October 15, 2004).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee 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 383, by the conduct set forth in Slip Opinion No. 753.

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
Department of Mental Health

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.

October 15, 2004