This issued on November 30, 2005

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 1403,	
Complainant,	PERB Case No. 02-U-28
v.	Opinion No. 805
Government of the District of Columbia, Office of Corporation Counsel, and Office of Labor Relations and Collective Bargaining,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Local 1403 ("Complainant" or "Union") filed an unfair labor practice complaint in the above-captioned matter. The Complainant alleges that the Government of the District of Columbia, the Office of the Corporation Counsel ("OCC")[1], and the Office of Labor Relations and Collective Bargaining ("Respondents" or "OLRCB"), failed to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5). Specifically, the Complainant alleges that the Respondents refused to negotiate with the Complainant over the distribution of monies that were made available to the OCC in the Fiscal Year 2002 Supplemental Budget Request Act.

[1]The Office of the Corporation Counsel OCC is now called the Office of the Attorney General.

The Hearing Examiner held a hearing in this matter[2] and issued a Report and Recommendations ("R&R") where he found that the Respondent did not violate the Comprehensive Merit Personnel Act ("CMPA"). Therefore, he recommended that the unfair labor practice complaint be dismissed. The parties did not file exceptions. The Hearing Examiner's R&R is before the Board for disposition.

II. Discussion

On November 2, 2001, this Board certified the Complainant as the exclusive representative for a unit consisting of "All attorneys employed by the [OCC]." (PERB Certification No. 121).[3] Although the Board certified the Complainant as the exclusive representative for the OCC bargaining unit, the appropriate compensation unit was not determined at this time.[4]

On December 21, 2001, the District of Columbia appropriated money to the OCC stating, that "no less than $353,000 shall be available to the Office of the Corporation Counsel [OCC] to support increases in the Attorney Retention Allowance."[5] Also, on April 11, 2002, the Mayor signed the "Fiscal Year 2002 Supplemental Budget Request Act of 2002" (known as the "FY 2002

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[2]In a separate Complaint (PERB Case No. 02-U-23), the Union also alleged that the Respondents violated D.C. Code §§ 1-617.04(a)(1) and (5) and 1-617.07. In that case, the Union claimed that the Respondents did not act in a timely manner to implement dues withholding as requested by the Union for those employees who authorized such withholding. PERB Case No. 02-U-23 and PERB Case No. 02-U-28 were consolidated. A hearing was held on the consolidated matter. The Hearing Examiner determined in PERB Case No. 02-U-23 that the Respondents violated §§ 1-617.04(a)(1) and 1-617.07 by not acting in a timely manner to implement dues withholding. In addition, he concluded that these actions did not constitute a failure to bargain in violation of D.C. Code §1-617.04(a)(5). The Respondents filed exceptions to the Hearing Examiner's findings in PERB Case No. 02-U-23. However, before the Board could consider the consolidated matter, the parties entered into a settlement agreement concerning PERB Case No. 02-U-23. As a result, PERB Case No. 02-U-23 was withdrawn with prejudice. Therefore, only the Hearing Examiner's findings in PERB Case No. 02-U-28 are before the Board for disposition.

[3] *See* PERB Case No. 01-RC-03 (November 2, 2001).

[4]Labor organizations are initially certified by the Board under the comprehensive Merit Personnel Act ("CMPA") to represent units of employees that have been determined to be appropriate for purpose of non-compensation terms-and-conditions bargaining. Once this determination is made, the Board then determines the compensation unit in which these employees should be placed. Unlike the determination of a terms-and-conditions unit, which is governed by criteria set forth under D.C. Code § 1-617.09 (2001 ed.), unit placement for the purpose of authorizing collective bargaining over compensation is governed by D.C. Code § 1-617.16(b) (2001 ed.).

[5]Public Law 107-96 "FY 2002 Appropriation" under the heading "Governmental Direction and Support".

Supplemental" (D.C. Act 14-322).[6] The FY 2002 Supplemental amended the above-cited provision of the FY 2002 Appropriation. The amendment provided that "not less than $353,000 shall be made available to the Office of the Corporation Counsel to support attorney compensation *consistent with performance measures in a negotiated collective bargaining agreement.*" (Emphasis added).

Subsequently, on May 20, 2002, OLRCB submitted non-compensation proposals to the Union. In response to OLRCB's non-compensation proposals, the Union submitted a compensation proposal on June 3, 2002, for immediate disposition of the $353,000 appropriated to the attorneys in the OCC. However, OLRCB did not respond to the Union's compensation proposal. As a result, on July 29, 2002, the Union filed the unfair labor practice complaint at issue in this case. In the complaint, the Union alleged that the Respondents refused to bargain over the disbursement of the appropriated funds. The Respondents filed an Answer[7] denying the allegations.

On August 2, 2002, OLRCB declared the compensation proposal to be non-negotiable because it sought to negotiate terms and conditions of employment on behalf of non-bargaining unit employees within the OCC. In response to this declaration, on August 19, 2002, the Union amended its compensation proposal. The amended proposal limited the proposed disbursal of the appropriated funds to bargaining unit members only. In September 2002, the Union also made proposals pertaining to other compensation issues. OLRCB did not make any counter proposals concerning compensation. The negotiations resulted in an agreement regarding a number of non-compensation issues. However, no compensation issues were resolved by September 26, 2002.

On October 30, 2002, this Board made a determination concerning the appropriate compensation unit for attorneys represented by the Union. These attorneys were placed in Compensation Unit 33,[8] which was a newly created unit. Thereafter, in November 2002, the Respondents proposed a comprehensive compensation package.

In its complaint, the Complainant asserts that the Respondents violated D.C. Code § 1-617.04(1) and (5) by failing to negotiate upon demand over the disbursement of the money that was appropriated in order to increase the salaries of the attorneys in the OCC. In support of its position, the Complainant claims that: (1) in Certification No. 121, Local 1403 was certified as the exclusive bargaining representative of attorneys at OCC for collective bargaining over terms and conditions of employment *as well as* compensation matters; (2) OLRCB's position, that it must wait for the Board to certify a compensation unit before negotiating over compensation, is contrary to D.C.

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[6]D.C. Act 14-322 became effective on August 2, 2002, when it was signed by the President as Public Law 107-206.

[7]The Answer was filed on August 14, 2002.

[8]Slip Op. No. 694, PERB Case No. 02-CU-01 (October 30, 2002).

Code §1-617.17(m) - because this provision imposes no restriction on how soon bargaining may commence; (3) the FY 2002 Appropriations Act contains mandatory language and the Home Rule Act and the Anti-Deficiency Act require that the $353,000 be distributed in the same year that the money was appropriated; and (4) the FY 2002 Appropriations Act created a special bargaining situation that was an exception to the collective bargaining provisions of the CMPA. As a remedy, the Complainant requested that the Board order the Respondents to bargain in good faith, post a notice acknowledging that they violated the CMPA and impose sanctions.

In their Answer, the Respondents argue that: (1) compensation negotiations could not begin until after the Board determined the appropriate compensation unit for attorneys in the OCC bargaining unit, pursuant to D.C. Code §1-617.17(m);[9] (2) the duty to bargain did not arise until after the FY 2002 Supplemental was finalized on August 2, 2002 when it was signed by the President; (3) in the alternative, a duty to bargain did not arise until after the Union made a legal compensation proposal by excluding the non-bargaining unit attorneys from its compensation proposal, on August 19, 2002; and (4) the disbursement of the $353,000.00 must be consistent with performance measures in a multi-year negotiated collective bargaining agreement. Finally, the Respondents argue that a complete compensation package was proposed in November 2002 - proof that they were not refusing to bargain over compensation.

The Hearing Examiner found that there was "no real dispute that [the] Respondents did not bargain with [the] Complainant over the distribution of the $353,000 provided in the FY 2002 Supplemental . . . before June 29, 2002, when [the] Complainant filed the unfair labor practice complaint. In order for this failure to constitute an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5), [the] Respondents must have had an obligation to bargain during this period." (R&R at p. 17) However, the Hearing Examiner concluded that they had no such obligation for several reasons.

First, the Hearing Examiner noted that § 1-617.17(m) provides that "When the Public Employee Relations Board is required to determine an appropriate bargaining unit for the purpose of compensation negotiations, . . . negotiations for compensation . . . shall begin no later than 90 days after the Board's determination." Relying on this provision, the Hearing Examiner determined

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[9]In "Respondents' Post-Hearing Brief", in support of this proposition, the Respondents cited *American Federation of Government Employees, Local 2725, and District of Columbia Department of Housing and Community Development*, Slip Op. No. 11, PERB Case No. 80-U-06 (1981). (Post Hearing Brief at p. 10). In *Local 2725*, the Union alleged that the Respondent violated the CMPA by its refusal to engage in collective bargaining. The Respondent in that case declined to continue with negotiations because the Complainant's proposals included *compensation* as well as non-compensation issues prior to this Board's determination of the appropriate compensation bargaining units for the District. This Board held that "As to the required simultaneous bargaining of terms and conditions of employment issues and compensation issues, [once we] made [a] determination of [the] appropriate compensation bargaining units in [Slip Op. No. 5, PERB Case No. 80-R-08] (February 6, 1981, as amended February 19, 1981), [this] removed any impediment to the simultaneous bargaining of terms and conditions of employment issues with compensation issues." *Id.* At p. 2.

that "under the scheme set forth in D.C. Code § 1-617.17, compensation bargaining cannot begin until [the Board] has established an appropriate compensation unit for affected employees." (R&R at p. 17) Based on the record, the Hearing Examiner concluded that the Board did not certify a *compensation* unit for the employees represented by the Complainant until October 30, 2002, well after the Complainants filed their complaint. *See* PERB Case No. 02-CU-01 (2002).

The Hearing Examiner determined that this Board's first certification of the Complainant as the exclusive bargaining representative of the attorneys at OCC for terms and conditions as well as compensation in PERB Case No. 01-RC-03 (November 2, 2001), was not to be confused with the mandate that the Respondents bargain upon demand. He found that "[t]he certification language merely provided that if and when an obligation to bargain over such matters with respect to attorneys at OCC arose, Local 1403 would have the exclusive entitlement to represent those attorneys. Other events had to occur, however, for that bargaining obligation to be triggered, including [the Board's] establishment of a *compensation* unit that includes attorneys at OCC which, as noted, did not occur until October 30, [2002]." (R&R p. 17)

In addition, the Hearing Examiner identified a second event which had to occur before the obligation to bargain was triggered: namely, that the statutory provision for the $353,000 had to be enacted. He found that it had not yet been enacted on June 29, 2002, when the complaint was filed and became effective only after the President of the United States signed the legislation on August 2, 2002. (R&R, p.18)

In light of the above, the Hearing Examiner rejected the argument that the amendments to D.C. Code § 1-617.17(m) (2001) made by D.C. Law 14-190, required the Respondents to bargain over the distribution of the $353,000.[10] He noted that D.C. Code § 1-617.17(m) provides that

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[10]The language of D.C. Code § 1-617.17(m) (2001) set forth in footnote 8, was amended on April 12, 2005, by the "Labor Relations and Collective Bargaining Amendment Act of 2004". The resulting new language is as follows: "When the Public Employee Relations Board makes a determination as to the appropriate bargaining unit for the purpose of compensation negotiations pursuant to §1-617.16, negotiations for compensation . . . *shall commence as provided for in subsection (f) of this section.*" (Emphasis added.)

In turn, §1-617.17 *(f)(1)* provides as follows:

> Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that *negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.* (Emphasis added.)
> Section 1-617.17*(f)(1)(A)* provides that:
>
> > (1) A party seeking to negotiate a compensation agreement shall serve a written demand to bargain upon the other party during the period 120 days to 90 days prior to the first day of a fiscal year, for purposes of negotiating a compensation agreement for the subsequent fiscal year.

compensation bargaining shall begin no later than 90 days after the Board's determination of the appropriate compensation unit. Furthermore, he indicated that even if the amended language had been established law, "it could not have required negotiations over the distribution of monies that, in the form at issue here, had not yet been enacted". (R&R, p. 19) He also rejected the argument that the following language: "The Mayor shall negotiate agreements concerning working conditions at the same time he or she negotiates compensation issues" in § 1-617.17(m), overrides the requirement that this Board first establish an appropriate bargaining unit. (R&R, p. 19)

Finally, the Hearing Examiner rejected the Union's argument that implementation of the FY 2002 Supplemental was mandatory because failure to disburse the appropriated funds would violate the Home Rule Act and the Anti-Deficiency Act. He found that the Home Rule Act and the Anti-Deficiency Act are not within the Board's authority or jurisdiction. Rather, he noted that the Board is entrusted with determining whether an unfair labor practice has been committed under the provisions of the CMPA. (R&R, p. 18)

For all of these, reasons, the Hearing Examiner concluded that the Respondents had no obligation to bargain with the Complainant over the disbursement of the $353,000 and its failure to do so did not violate not violate D.C. Code § 1-617.04(a)(1) and (5). Therefore, he recommended that the complaint be dismissed.

The Hearing Examiner's findings and recommendations are before the Board for disposition. Specifically, we must decide whether to adopt the Hearing Examiner's finding that the Respondents' refusal to negotiate with the Complainant over the distribution of $353,000.00 which was made available to the OCC in the Fiscal Year 2002 Supplemental Budget Request Act, did not violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.)

The Board has previously addressed the issue of whether there is a duty to engage in compensation negotiations simultaneously with negotiations concerning terms and conditions of

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> . . .
> (ii) Where the compensation agreement to be negotiated is for a newly certified unit *assigned to a newly created compensation unit*, working conditions or other non-compensation matters shall be negotiated concurrently with negotiations concerning compensation. (Emphasis added).

Therefore, the above new provisions of D.C. Code §1-617.17(m) and 617.17(f) require that compensation bargaining be completed prior to the submission of a budget for the given fiscal year. However, the Complaint in this matter was filed on July 29, 2002, and the underlying facts of this case occurred prior to the change in the law. Therefore, the language found in the 2001 edition of the D.C. Code is applicable to the facts of this case. As a result, pursuant to D.C. Code § 1-617.17(m) (2001): "When [the Board] is required to determine an appropriate bargaining unit for the purpose of compensation [bargaining] . . . negotiations for compensation . . .shall begin no later than 90 days after the Board's determination."

employment when the appropriate compensation unit has not yet been determined by PERB. We have held in *American Federation of Government Employees, Local 2725, and District of Columbia Department of Housing and Community Development, id.*, that "As to the required simultaneous bargaining of terms and conditions of employment issues and compensation issues, [once we make a] determination of [the] appropriate compensation bargaining unit . . . , [this] remove[s] any impediment to the simultaneous bargaining of terms and conditions of employment issues with compensation issues." This outcome is reflected in D.C. Code § 1-617.17(m) (2001), relied upon by the Hearing Examiner, which states that "negotiations for compensation between management and the exclusive representative . . . shall begin no later than 90 days *after the Board's determination [of the appropriate compensation unit]"*. (Emphasis added). Here, the OLRCB commenced compensation bargaining within 90 days after the Board's determination of the appropriate compensation unit. Therefore, we concur with the Hearing Examiner's conclusion that OLRCB's refusal to bargain before our October 30, 2002 certification of the attorney compensation unit, cannot constitute a refusal to bargain under D.C. Code § 1-617.04(a) (1) and (5).

Pursuant to D.C. Code § 1-605.02 (3) (2001 ed.) and Board Rule 520.14, we conclude that the Hearing Examiner's findings, conclusions and recommendations are reasonable, supported by the record and consistent with Board precedent. As a result, the Board hereby adopts the Hearing Examiner's recommendation that the Respondent did not violate D.C. Code § 1-617.04(a) (1) and (5) by refusing to bargain.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Hearing Examiner's findings and recommendations are adopted. The unfair labor practice complaint is dismissed.

(2) Pursuant to Board Rule 559.2, this decision is final upon issuance.

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

November 30, 2005

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:

American Federation of Government Employees, Local 1403,	*	
Complainant	*	
v.	*	PERB Case No. 02-U-23
Government of the District of Columbia,	*	
Respondent	*	
American Federation of Government Employees, Local 1403,	*	
Complainant	*	
v.	*	PERB Case No. 02-U-28
Government of the District of Columbia, Office of Corporation Council, and Office of Labor Relations and Collective Bargaining,	*	
Respondents	*	

Before: Barry E. Shapiro, Hearing Examiner

REPORT OF FINDINGS AND RECOMMENDATIONS

This case involves two unfair labor practice complaints filed by American Federation of Government Employees, Local 1403 (Complainant or Local 1403). The first Unfair Labor

Practice Complaint (Complaint 1, PERB Case No. 02-U-23), filed July 11, 2002,[1] alleged that the District of Columbia Government (Respondent) violated DCC §1-617.04(a)(1) and (5) and §1-617.07 by refusing to deduct and collect union dues from the salaries of bargaining unit employees who had specifically authorized said deductions. Respondent submitted its Answer to the Unfair Labor Practice Complaint[2] (Answer 1) on July 26, denying that it had committed the alleged unfair labor practice, and requesting that Complaint 1 be dismissed.

Complainant submitted a second Unfair Labor Practice Complaint (Complaint 2, PERB Case No. 02-U-28) on July 29, alleging that the District of Columbia, the D. C. Office of Corporation Counsel (OCC), and the D. C. Office of Labor Relations and Collective Bargaining (Respondents) violated DCC §1-617.04(a)(1) and (5) by refusing to bargain over the distribution of $353,000 made available to OCC for special payments to attorneys at OCC. The Respondents' Answer to the Unfair Labor Practice Complaint (Answer 2), August 13, denied committing the alleged unfair labor practice and requested that Complaint 2 be dismissed.

On August 16 the Executive Director, PERB, consolidated the two cases.

A hearing was held before the undersigned on October 4, October 29, and November 5. At the hearing, Complainant was represented by Steven J. Anderson, Esq., and Respondents by Joseph R. Reyna, Esq. Maria Steiner-Smith, an OCC attorney for child support issues, Michael McMiller, Treasurer, Local 1403, and Charlotte Bradley, President, Local 1403, testified for Complainant with respect to Case No. 00-U-23; Bradley was Complainant's sole witness on Case No. 02-U-28. Respondent called Hugh Hassan, National Representative, AFGE District 14, and Walter W. Wojcik, Jr., supervisory labor relations specialist, OLRCB, to testify with respect Case No. 02-U-23; Respondents called no witnesses on Case No. 02-U-28. Pursuant to PERB Rule 551.1, a stenographic transcript (Tr.) was prepared and constitutes the official record of the hearing. Complainant and Respondents submitted post-hearing briefs on February 18 and 19, 2003, respectively.

PERB Case Nos. 02-U-23 (Complaint 1) and 02-U-28 (Complaint 2) raise entirely separate issues. In the interest of clarity, the background, arguments, and discussion concerning each complaint will be presented separately.

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[1]Except where otherwise noted, all dates in this Report refer to 2002.

[2]Respondent's Motion to Amend Answer to the Unfair Labor Practice Complaint was filed on August 23, 2002; it corrected some typographical errors in the original Answer 1.

PERB CASE NO. 02-U-23

Factual Background

On November 2, 2001, PERB certified Complainant Local 1403 as the exclusive representative for collective bargaining over terms and conditions of employment, including compensation, of "All attorneys employed by the Office of the Corporation Counsel" (except those excluded by statute from such representation) (PERB Certification No. 121, C. Ex. 1-C).

Under DCC §1-617.07 --

> Any labor organization which has been certified as the exclusive representative shall, upon request, have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues. Such authorization, costs, and termination shall be proper subjects of collective bargaining. Service fees may be deducted from an employee's salary by the employer if such a provision is contained in the bargaining agreement.

Charlotte Bradley, at that time the Acting President of Local 1403, testified that she attempted to reach Mary Leary, Director, OLRCB, shortly after the PERB certification to begin discussion of dues withholding. At a meeting on January 24, according to Bradley, Leary said she would not discuss the issue of dues withholding outside the context of an overall collective bargaining agreement (Tr. 119-121). In the event, however, Leary changed her mind, and the parties did negotiate a stand-alone agreement on dues withholding.

In a "Memorandum of Understanding: Dues Deduction AFGE Local 1403" (MOU), February 19 (C. Ex. 2), which was signed for Complainant by Hugh Hassan, National Representative of AFGE District 14, and for Respondent by Joseph R. Reyna, OLRCB --

> The Employer agrees to deduct Union dues biweekly from the pay of employee members upon proper authorization. The employee must complete and sign Form 277 to authorize the withholding. The amount to be deducted shall be certified to the Employer in writing by the appropriate official of AFGE Local 1403.

On March 12, Bradley sent Joseph Reyna, OLRCB, a letter (C. Ex. 3) in which she provided the biweekly withholding amount -- $13.00 -- and Local 1403's bank account number; and with which she enclosed a list of 97 bargaining unit members who had authorized dues withholding, along with the Forms 277 filled out by those members (C. Ex. 26). Complainant

stipulated (Tr. 128-29) that on March 12 Part B of the forms, which states the amount of the biweekly withholding and provides space for the signature of a Local 1403 official, had not been completed.

Bradley testified (Tr. 130ff.) that she had contact over the following weeks with representatives of OLRCB, the D. C. Office of Personnel (DCOP), and the Office of Pay and Retirement Services (OPRS) about the status of the dues withholding process. At first, she said, she was advised that the Forms 277 could not be processed because they were photocopies, not originals; on April 2, however, Mary Leary, Director, OLRCB, advised her that OPRS would process photocopies (C. Ex. 4).

Bradley testified that on May 2 she received a phone call from Kitty Pinkett at OLRCB, informing her that she needed to sign the Forms 277; this, Bradley said, was the first time anyone had told her about this. She went to OLRCB that day and signed the forms (Tr. 140-44).

At the same time, Bradley stated, Pinkett told her that she needed to obtain a union code from OPRS. Bradley was eventually able to contact Judy Banks, OPRS, who told her this code had to be provided by OLRCB (Tr. 146).

Bradley stated that she continued to inquire about the status of the implementation of dues withholding, including at bargaining sessions over non-compensation issues (C. Ex. 5). When dues withholding had still not been implemented, Complainant filed Complaint 1 on July 11.

The dues withholding eventually began with Pay Period 19, beginning August 25; the actual payment of the withheld dues to Local 1403 was on September 17, the pay day for Pay Period 19 (R. Ex. 6).

Issues

Did Respondent act in a timely manner to implement Complainant's request to have dues withheld from the salaries of those employees who authorized such withholding?

Arguments of the Parties

Complainant

Complainant asserts that payment of union dues is one form of assistance to unions that is protected by statute (DCC §1-617.06); Respondent's unreasonable delay in implementing dues withholding deprived Local 1403 of the monetary assistance union members had tendered when

they signed withholding authorization cards. Such delay, Complainant argues, interfered with employees' right to provide this assistance, and was therefore an unfair labor practice under DCC §1-617.04(a)(1). Additionally, Complainant argues, Respondent's failure to implement the "Memorandum of Understanding" on dues withholding, which was negotiated pursuant to DCC §1-617.07, violated its obligation, under DCC §1-617.04(a)(5) to bargain in good faith.

Complainant argues that many of the explanations offered by Respondent as to why the dues withholding could not be implemented sooner do not withstand scrutiny. For example, Complainant notes that on May 6 Kitty Pinkett in OLRCB told Charlotte Bradley that she (Bradley) needed to get a union code from OPRS. Bradley initiated contact with OPRS, only to be told a day or two later that she needed to get this code from OLRCB (Tr. 144-47). "Hence," Complainant states, "the run-a-round had come full circle" (Complainant's Post Trial Brief in PERB Case No. 02-U-23 at page 5 of 9 unnumbered pages). Another example dates from June 13, when OLRCB told Bradley that OPRS did not have the number for Local 1403's bank account (C. Ex. 6). In fact, Complainant notes, Bradley had provided this number on March 12 (C. Ex. 3).

Complainant rejects the claim put forth by Respondent that the failure to begin the withholding in a more timely manner was due to Complainant's failure to sign the individual authorization cards. In Complainant's view, if Respondent believed Local 1403 had not satisfied the requirements of the "Memorandum of Understanding" it had an obligation to notify Local 1403 of this. In any event, Bradley did sign the authorization cards as early as May 6, immediately upon being informed by Respondent of the need for her signature.

Complainant states that the District of Columbia can implement withholding from employees' pay quickly when it wishes to do so by pointing to the testimony of Maria Steiner-Smith, an attorney in OCC, who testified that the implementation of withholding of court-ordered child support payments from salaries of District employees can usually be accomplished in about four to six weeks (Tr. 51-58).

Complainant notes that in a previous decision, *AFGE Local 3721 v. District of Columbia Fire Department*, PERB Case No. 88-U-25, Op. No. 202 (1988), PERB held that the employer's failure to implement an increase in the amount of dues withholding for two and one-half months was an unfair labor practice. "The timely collection of dues," PERB stated, "is critical to the union's ability to discharge effectively its duties on behalf of employees who have chosen the union as their exclusive representatives" (*id.*, at page 3). In the instant complaint, Complainant notes, Respondent's delay in implementing dues withholding was considerably longer.

As remedy, Complainant asks for the same remedy ordered by PERB in *AFGE Local 3721*, where the employer was ordered to "reimburse the Union for all dues which the union did

not receive as a result of the [employer's] failure to timely implement the Union's request including any interest on this amount."[3] Complainant rejects Respondent's assertion that it should have made some attempt to collect the dues directly from members.

Respondent

Respondent argues as a threshold matter that PERB is without jurisdiction in this matter. Respondent asserts that it complied with applicable law, DCC §1-617.07, when it negotiated the MOU on dues withholding. What is at issue here, in Respondent's view, is a challenge to the implementation of the MOU. Respondent cites several cases in which PERB held that allegations that a party to a collective bargaining agreement has violated the agreement are outside its jurisdiction (see pp. 23-24 of Respondent's Post-Hearing Brief for cases cited). Respondent also points to National Labor Relations Board case law holding that the issue of withholding union dues and service fees is a matter for a collective bargaining agreement.

Even if PERB holds that it has jurisdiction, Respondent argues that it has not violated DCC §1-617.04(a)(1) or (5). Two months of the delay in implementing the withholding was caused by Complainant's failure to have Local 1403's President certify the biweekly amount to be withheld and sign the authorization cards until May 6. Once Respondent had the properly signed and certified forms in hand, the amount of time it took to implement was because of the administrative complexities associated with the fact that this was an entirely new bargaining unit, and various personnel, payroll, and computer systems had to be modified to allow the implementation. Respondent notes the testimony of Walter W. Wojcik, Jr., a supervisory labor relations specialist in OLRCB, who oversees dues withholding issues, about the numerous agencies and steps involved in the matter (Tr. 241-45). Respondent asserts that OLRCB did everything in its power to further the process of implementing the dues withholding, including making inquiries to OPRS (R. Exs. 5 and 7); creating a new Collective Bargaining Unit (CBU) code, BQA, even though Local 1403 did not have a collectively bargained pay schedule; and requesting that employee records be batch processed to reflect the new CBU code (R. Ex. 4).

Respondent rejects Complainant's comparison of the issues in the instant case with those in *AFGE Local 3721*, where the issue was a two and one-half month delay in implementing an increase in the biweekly withholding amount. PERB stated in its decision in *AFGE 3721* that it was not announcing a *per se* rule. In *AFGE 3721* all the necessary personnel, payroll, and computer systems were already in place; in the instant case, by contrast, new systems had to be

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[3]In its Post-Trial Brief, Complainant requests reimbursement for dues that were not withheld from the pay of participating employees starting with May 14, the pay day for the pay period that would have begun 24 days earlier. (See testimony of Michael McMiller, Treasurer, Local 1403, Tr. 88-94, and a worksheet prepared by him, C. Ex. 25.)

developed. Furthermore, in *AFGE 3721*, Respondent notes, the employer offered no explanation for its delay; in the instant case, Respondent has offered a persuasive explanation. Respondent notes that now that the system requirements for Local 1403's dues withholding are in place, new authorizations are implemented quickly (R. Exs. 7 and 8; Tr. 266-67).

Respondent also rejects Complainant's attempt to draw a parallel between the implementation of court-ordered withholding for child support payments, for which system requirements have been in place for at least four years, and the implementation of an entire set of new procedural and computer systems requirements for dues withholding for a newly-certified bargaining unit.

With respect to the remedy requested by Complainant -- reimbursement of dues not withheld -- Respondent rejects Complainant's reliance on the remedy directed by PERB in *AFGE 3721*. Respondent characterizes that decision as anomalous and inconsistent with PERB and NLRB case law. In Respondent's view, the case law shows that the withholding of union dues and service fees are creatures of collective bargaining agreements, and that any remedies for alleged violations of such agreements should be sought through the negotiated grievance procedure, not through an unfair labor practice complaint before PERB.

Respondent asks that Complaint 1 be dismissed in its entirety.

Discussion

Respondent's argument that this case involves a contract dispute, the resolution of which is outside PERB's jurisdiction, is without merit. The right to have dues deducted from the salaries of those employees who authorize such deductions is conferred on exclusive representatives, including Complainant, by statute, not by collective bargaining agreement.[4] As PERB noted in *AFGE 3721*, "it is not necessary for the parties to have an agreement specifying the manner in which dues will be withheld before the duty to honor the Union's request arises" (at page 3).[5] Additionally, PERB stated that "Section 1-618.7[6] placed an obligation on [Respondent]

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[4]Respondent is correct in noting that the withholding of service fees is entirely a creature of a collective bargaining agreement; the withholding of service fees is, however, not at issue in the instant case.

[5]Inasmuch as DCC §1-617.07 specifically requires the District to withhold union dues upon request of the exclusive representative, case law of the NLRB that interprets a statute, the National Labor Relations Act, that is silent on the matter of dues withholding, is irrelevant.

[6]Now DCC §1-617.07 (2001 edition).

DCFD to honor the requested dues withholding increase *in a timely manner*" (*id.*, footnote 5; italics added). Whether or not Respondent complied in a timely manner with Complainant's request to have dues withheld is a statutory question within PERB's jurisdiction.

PERB found statutory violation by Respondent D. C. Fire Department in *AFGE 3721*:

> ...Under the circumstances of this case, a two and one-half (2 ½) month delay coupled with the failure of OLRCB to give an adequate justification for the delay, the Board concludes that DCFD's action in honoring the Union's request was untimely and thus improper. In so finding, the Board is not applying a per se standard. Rather, the Board's decision in this case is based on the length of time coupled with the absence of an assertion by DCFD of any reasonable explanation.

The question raised by the instant case is whether, given the totality of circumstances involved, Respondent acted in a timely manner in honoring its statutory obligation to implement Complainant's dues withholding request. For the reasons that follow, I find that it did not.

Respondent presents a plausible explanation of why the full amount of time that elapsed between May 6, when Local 1403 President Bradley signed the initial batch of authorization cards (Forms 277), and August 25, the beginning date of the first pay period for which dues withholding was actually implemented. Respondent's assertion that the three and one-half months it took after Bradley signed the authorization forms on May 6 constitutes timely compliance with its statutory obligation is, however, a persuasive defense against an unfair labor practice charge only on the assumption that the obligation did not begin until May 6. This assumption is unwarranted; in fact, Respondent's obligations began earlier.

Respondent makes a persuasive case that the situation it faced in implementing dues withholding in response to a request from a newly-certified exclusive representative was not nearly so simple as the situation involved in *AFGE 3721*, where only an increase in the biweekly amount withheld was at issue; or as in the withholding of child support payments from salaries of District employees, for which a system has been in place for more than four years. The issue here is not why it took Respondent as long as it did to implement dues withholding once it got Bradley to sign and certify the authorization forms on May 6, but rather why Respondent did not take appropriate actions before this date.

Respondent was aware no later than February 19, when it signed the MOU, that Complainant was invoking its statutory right to have dues withheld from the salaries of employees who authorized such withholding. At that moment, Respondent knew that it would have to take certain steps to implement the MOU, such as establishing union and CBU codes and updating the personnel and payroll records of unit employees to reflect their new status as organized

employees.[7] While some of these steps were necessary for the implementation of dues withholding, they were already required by the certification of Complainant as the exclusive representative of attorneys in OCC by PERB in November 2001. According to the testimony of Respondent's witness, Walter Wojcik, on cross-examination, there was no reason these programming or system changes could not have been initiated immediately after the certification of the new bargaining unit (Tr. 297). If Respondent chose not to begin this process sooner than May 6, it did so at its own risk.

Respondent received the initial batch of authorization forms from Bradley on March 12. In the letter transmitting these forms to OLRCB, Bradley indicated the amount of biweekly dues to be withheld and provided the number of Local 1403's bank account. It is not necessary to determine whether this letter obviated the need for her to sign and certify each of the individual forms, a matter of contract rather than statutory interpretation, and hence outside the scope of Complaint 1.[8] It suffices to conclude that if Respondent found the materials submitted to it on March 12 to be inadequate, it had a responsibility to inform Complainant in a timely manner so that it could correct the omission. The record indicates that this was not done for nearly two months.

Respondent's argument that implementing Complainant's request for dues withholding required the development and implementation of new personnel and computer systems, while not without some merit, is overstated. Complainant's request for dues withholding did not require the District to develop, for the first time, brand new systems and procedures; dues withholding had been going on for many years when Complainant requested such an arrangement. Rather, what was required was the establishment of appropriate codes for existing data elements that uniquely identified Complainant as the new exclusive representative of attorneys in OCC. It is clear from the testimony of Walter Wojcik that basic protocols for selecting appropriate codes were well established. He testified, for example, that it was OLRCB's practice to assign B-- as CBU codes

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[7]Respondent was presumably aware that Complainant was invoking this right even before actual negotiations that led to the MOU began. Bradley testified without rebuttal that Mary Leary, Director, OLRCB, initially rebuffed Complainant's efforts to institute dues withholding on the grounds that this would have to be part of an overall collective bargaining agreement. Arguably, this refusal to honor a specific statutory obligation, had it not been quickly reversed, would itself have been an unfair labor practice.

[8]The MOU requires employees who wish to have dues withheld from their salaries sign Form 277. The requirement that an appropriate official of Local 1403 certify the amount to be withheld is not specifically tied to Section B of Form 277. It would not, therefore, be unreasonable to conclude that the March 12 letter signed by Bradley in which the biweekly amount was stated satisfied the certification requirement.

for AFGE bargaining units; since the last AFGE unit to be certified had been BOA, he said, it was logical to assign BQA to Local 1403.[9] According to the record, OLRCB did not ask OPRS to process the change of CBU code for the affected employees from XAA (the code indicating no union representation) to BQA until August 15 (R. Ex. 4), even though the code had been established as early as May 16 (see R. Ex. 2). It is true that PERB had not yet established a compensation unit for the employees represented by Complainant, but the record shows that OLRCB was able to create a temporary code without much difficulty (R. Ex. 9); nothing in the record explains why this could not have been done much earlier.

Respondent did not act in a timely manner to honor Complainant's request for dues withholding. Its failure to do so violated DCC §1-617.07 and interfered with the rights of employees under *DCC §1-617.06(a)(2) to* assist labor organizations, and therefore constitutes a violation of DCC §1-617.04(a)(1). Complainant asserts that such failure also violates DCC §1-617.04(a)(5), which imposes a general obligation on Respondent to bargain in good faith. While Bradley's unrebutted testimony is that Mary Leary initially refused, on January 24, to discuss the matter of dues withholding at all except in the context of an overall collective bargaining agreement, that refusal was obviously withdrawn when the parties did in fact negotiate the MOU on dues withholding shortly thereafter. Any possible violation of the duty to bargain in good faith was, therefore, cured long before Complaint 1 was even filed. There is no showing that Respondent repudiated the agreement it actually reached with Complainant. As Respondent points out, the interpretation and application of provisions of a collective bargaining agreement are outside PERB's jurisdiction, and disputes over these matters are more properly resolved through a negotiated grievance procedure. I do not find that Respondent's actions violated DCC §1-617.04(a)(5).

As remedy, Complainant seeks reimbursement for dues not withheld, the remedy directed by PERB in *AFGE 3721*. Respondent's assertion that PERB's decision in *AFGE 3721* was "anomalous" is not persuasive. Respondent offers no alternative remedy that might be appropriate in the circumstances of the instant case. Complainant describes its entitlement to reimbursement for dues not withheld in an analysis submitted as Complainant's Exhibit 25. This analysis begins its calculations on May 14, the pay day for the pay period that began 24 days earlier. The choice of this beginning date for such entitlement appears to be based on the date when the national office of AFGE began seeking the national levy on locally-collected dues, not on a clear statement of when, in light of the procedural issues involved, Complainant believes Respondent should have commenced the withholding.

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[9]Wojcik explained that the second letter in the three-letter code was used to identify the particular unit of the overall union identified by the first letter, and the third letter to identify any subunits. The record does not explain why BPA would not have been the next logical code after BOA.

The record shows it took Respondent from May 6 to August 25 to implement the dues withholding, a period of approximately three and one-half months; in view of the number of steps and agencies involved, as described by Respondent, this amount of time does not seem unreasonable. Had Respondent initiated the actions necessary to implement dues withholding at the time the MOU was signed on February 19, and assuming the implementation process took the same three and one-half months it actually took after May 6, dues withholding would have begun on or about June 1. Accordingly, Respondent should be directed to reimburse Complainant for dues that were not withheld from the pay of employees who had signed forms authorizing such withholding beginning with the first pay period that began on or after June 1, 2002.

PERB CASE NO. 02-U-28

Factual Background

In the interest of completeness, the following presentation of the factual background to this case includes events that occurred after the filing of Complaint 2 on July 29, as well as events that occurred after the closing of the evidentiary record in this case after the final hearing on November 5.

Certification of AFGE Local 1403

PERB announced, in Certification 121 (PERB Case No. 01-RC-03), November 2, 2001, that --

> The American Federation of Government Employees, AFL-CIO, has been design[at]ed by the employees in the unit described below as their exclusive representative for the purposes of collective bargaining over terms and conditions of employment, including compensation, with the named employer.
>
> > All attorneys employed by the Office of the Corporation Counsel, excluding management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D. C. Law 2-139.

Although the certification provided that Complainant would be the exclusive representative of OCC attorneys for both terms-and-conditions and compensation bargaining, PERB did not immediately establish a compensation unit for these employees. The statutory provisions on the establishment of appropriate compensation units are in DCC §1-617.16(b).

On October 30, 2002, PERB established Compensation Unit 33, consisting of --

> All attorneys within the legal service who come within the personnel authority of the Mayor of the District of Columbia and who are currently represented by labor organizations certified as exclusive bargaining agents for non-compensation bargaining by the Public Employee Relations Board.

Decision and Order on Compensation Unit Determination, PERB Case No. 02-CU-01 (Opinion No. 694)

Compensation Unit 33 included those attorneys represented by Complainant, but also included attorneys in the legal service who worked in other District agencies. In establishing this compensation unit, PERB noted that the criteria for determining appropriate units for non-compensation terms-and-conditions bargaining and for compensation bargaining are governed by different provisions of law, DCC §1-617.09 and DCC §1-617.16(b), respectively.

Attorney Retention Allowances

Special provisions on pay for attorneys in the District's legal service, and requirements for linking this pay to individual performance, are found in DCC §1-608.51 *et seq.* Guidance on the implementation of these provisions, known as the Attorney Retention Allowance (ARA) is issued by OCC, and is found in §3613 of the District Personnel Manual.

Public Law 107-96, approved December 21, 2001 ("FY02 Appropriation", C. Ex. 104), appropriated to the District of Columbia, under the heading "Governmental Direction and Support", $286,138,000, out of which "no less than $353,000 shall be available to the Office of the Corporation Counsel to support increases in the Attorney Retention Allowance". There is no indication in the record that this specific language in the FY02 Appropriation was ever implemented, nor that Complainant sought to bargain with Respondent over its implementation.

On April 11, the Mayor of the District of Columbia signed D. C. Act 14-322, the "Fiscal Year 2002 Supplemental Budget Request Act of 2002" ("FY02 Supplemental", C. Ex. 105). The FY02 Supplemental amended the above-cited provision of the FY02 Appropriation to provide that "not less than $353,000 shall be available to the Office of the Corporation Counsel to support attorney compensation consistent with performance measures in a negotiated collective bargaining agreement." The FY02 Supplemental was subsequently enacted by the United States Congress, and was signed by the President on August 2 as Public Law 107-206. It is the implementation of this amended provision over which Complainant seeks to negotiate with Respondents.

On May 29, Officer, Anthony F. Pompa, the District's Deputy Chief Financial Officer for

Financial Operations and Systems, replied to an inquiry from OCC's Chief Financial Officer, Carla W. Carter, about how to accrue the $353,000 appropriated for FY 2002 that she apparently anticipated would not be paid until FY 2003:

> It appears, based on your memorandum, that the anticipated personal service cost would be clearly allocable to FY 2002. Therefore, if the negotiations between the Union and the Office of Corporation Counsel (OCC) are completed within a reasonable time after the end of the fiscal year (preferably by the due date of the FY 2002 accrued liabilities closing package), we will have no objections to the year-end accrual of the specified amount.

(C. Ex. 124.) The record does not indicate what the due date was for the Fiscal Year 2002 accrued liabilities closing package.

Compensation and Non-Compensation Bargaining; Unfair Labor Practice Complaint

The parties negotiated "Ground Rules for First Contract Negotiations" on March 19 (R. Ex. 10-A). Among other things, the ground rules provided that "notwithstanding a tentative agreement on any item, no final agreement shall exist with respect to such item until there is a final agreement on the entire contract" (Section 5E). Although the ground rules did not specifically state whether they covered both non-compensation and compensation issues, the record seems to indicate that they covered non-compensation matters. (Curiously, however, Section 6, which covers impasse procedures, refers to DCC §1-617.17(f),[10] which covers compensation bargaining impasses, not to DCC §1-617.02(d), the provisions for dealing with impasses over non-compensation matters.)

The parties entered into negotiations over non-compensation matters sometime in late May. On or about May 20, Joseph Reyna, OLRCB, submitted to Bradley OCC's initial non-compensation proposals. The letter transmitting those proposals stated "The parties have agreed that they will complete the non-compensation bargaining before any compensation proposals are submitted by either side" (R. Ex. 12). A number of tentative non-compensation agreements were reached by September 26 (R. Ex. 18).

On June 3, Complainant transmitted to OLRCB a proposed "Memorandum of Agreement" (MOA) "for the immediate disposition of the $353,000 made available to attorneys within the Office of the Corporation Counsel (OCC) pursuant to the Fiscal Year 2002 Budget

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[10]Section 6 of the ground rules refers to "Section 1-617.17(f)(2) of the PERB Regulations"; this numbering corresponds to the relevant portions of the CMPA. Presumably, the parties meant to refer to the CMPA rather than to PERB's regulations.

Act, approved December 21, 2001 (Pub. L. 107-96; 115 Stat. 923), and recently modified by the Council in the Fiscal Year 2002 Supplemental Budget Request Act of 2002 (Act 14-322), signed by the Mayor on April 11, 2002" (C. Ex. 114). The MOA proposed that the disbursal of the $353,000 be "available only to union and non-union OCC attorneys who are employed by OCC as of the effective date of this agreement," and be completed within 30 days of the date of the agreement; it also proposed that the terms of the MOA be automatically incorporated into the parties' first compensation collective bargaining agreement (C. Ex. 115). Complainant asked that OLRCB respond to the proposal by June 10.

Local 1403 President Bradley testified Respondents told her they would be prepared to discuss the issue of the distribution of the $353,000 at a regularly-scheduled bargaining session on July 15 (Tr. 363). Notwithstanding this assurance, Bradley testified, Respondents offered different, ever-changing explanations for why the time was not ripe for such negotiations (Tr. 415-19).

Complainant filed Complaint 2 on July 29, arguing, among other things, that Respondents' refusal to bargain over the distribution of the $353,000 was a "patent attempt to frustrate the provisions of the Appropriations Acts and to deny rights to the members of the bargaining unit and to other OCC attorneys." Complainant warned that Respondents' refusal to bargain risked loss of the authority to spend the funds at all at the close of FY 2002.

Respondent did not reply to the proposed MOA in writing until August 2, when Joseph Reyna, OLRCB, advised Local 1403 President Bradley that "since your proposal seeks negotiations on terms and conditions of employment of non-bargaining unit employees within the OCC, we are compelled to declare your proposed MOA non-negotiable" (C. Ex. 117). On August 19, Bradley transmitted an amended proposed MOA (C. Ex. 121), which modified the language of the June 3 proposed MOA to provide that the disbursal of the $353,000 be limited and available only to "bargaining unit attorneys" employed by OCC. In the letter transmitting the amended proposed MOA (C. Ex. 120), Bradley expressed her belief that --

> As these funds have been lawfully appropriated for a specific purpose, management does not have the option of deciding **whether** they will enforce the Acts (i.e., by distributing the funds). Rather, management's only lawful option is to expend the funds pursuant to the requirements of the Acts (i.e., consistent with performance measures contained in a collective bargaining agreement). Consistent with the requirements of controlling appropriation acts (i.e., the District of Columbia Home Rule Act and the Anti-Deficiency Act) such funds must be committed for expenditure prior to the expiration of FY 2002 (September 30, 2002). (Emphasis in original)

On September 5, Complainant submitted its "Initial Union Compensation Proposal" (C. Ex. 125). Respondents submitted their comprehensive compensation proposals to Local 1403 on November 7 (R. Ex. 15).

Issues

Did Respondents commit an unfair labor practice by refusing to bargain with Complainant over the distribution of the $353,000 made available to OCC by the Fiscal Year 2002 Supplemental Budget Request Act?

Arguments of the Parties

Complainant

Complainant characterizes Respondents' actions as a concerted effort to thwart the right of bargaining unit employees to receive statutorily authorized compensation. In Complainant's view, the language of the FY02 Supplemental -- "not less than $353,000 **shall** be available" -- created a mandatory, non-discretionary duty on part of Respondents to distribute the appropriated monies before September 30, 2002. Union representation was not an impediment to accomplishing this.

Complainant asserts that Respondents' refusal to discuss distribution of the appropriated monies was contrary to the District's normal budget process. Under applicable District law (Complainant cites DCC §§1-204.41, 1-204.42, and 1-204.46), appropriated monies are to be spent in the year and for the purpose for which appropriated. Respondents' failure to act in accordance with the requirements of the appropriations law infringed on District and United States budget and appropriation processes, and constitutes a refusal to bargain in good faith and an interference with employees' right to bargain collectively.

In Complainant's view, the appropriation of the $353,000 created a unique situation not encompassed by the rules governing normal subjects of bargaining. Complainant rejects Respondents' contention that these funds had to be distributed only as part of a multi-year collective bargaining agreement. Complainant also rejects Respondents' reliance on Ground Rule 5E -- the agreement that no provision would be effective until all matters had been agreed upon -- to relieve themselves of the obligation to comply with a Federal statute, such as the FY02 Supplemental that appropriated the $353,000.

Complainant also rejects Respondents' argument that it had no obligation to bargain with Local 1403 because PERB had not yet established an appropriate compensation unit. Complainant notes that in Certification No. 121, PERB certified Local 1403 as the exclusive