

and Supplemental Report and Recommendation (SR&R), copies of which are attached hereto.

The Report and Recommendation

In his initial Report and Recommendation, the Hearing Examiner concluded that by unilaterally implementing a 40 percent (40%) cap on the number of bargaining-unit employees who were eligible to receive within-grade salary increases during AY '86-'87, and without providing notice and an opportunity to bargain with UDCFA, UDC violated D.C. Code Sec. 1-618.4(a)(1) and (5). The Hearing Examiner noted that the procedure for granting within-grade increases is expressly a mandatory subject of bargaining under D.C. Code Sec. 1-618.17 and, as a compensation item, under Sec. 1-618.8(b) of the Comprehensive Merit Personnel Act (CMPA). The Hearing Examiner found that UDC's "[r]efusal to bargain in good faith about such an item with the Union, as the exclusive representative of the faculty in the bargaining unit, [was] an unfair labor practice under ... D.C. Code Section 1-618.4(a)(5)." (R&R at 23.) He based this conclusion on his finding that the percentage limitation on the number of increases granted "was a modification or change of the previously existing policy and practice on this subject" prior to AY '86-'87, (R&R at 24), and that UDC did not consult with UDCFA concerning the change and "continually refused the Union's request to bargain about it." (R&R at 28.)^{3/} In so finding, the Hearing Examiner rejected UDC's contention that the 40% cap was not a change in the policy and practice concerning the granting of within-grade

^{3/} In further support of the Sec. 1-618.4(a)(5) violation the Hearing Examiner cited case law construing Section 8(a)(5) of the National Labor Relations Act (NLRA) which similarly makes an unfair labor practice the "refus[al] to bargain collectively with the representatives of his [(employer's)] employees...." See Allied Chemical Workers & Alkali Workers of America v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1972) (finding as prohibited unilateral modifications of matters involving mandatory subjects of bargaining in mid-term of an existing collective bargaining agreement); American Oil Co. v. NLRB, 602 F.2d 184 (8th Cir. 1979) and NLRB v. Central Illinois Public Service Company, 324 F.2d 916 (7th Cir. 1963) (changes in mandatory subjects of bargaining prohibited notwithstanding fact that matter is not specifically covered in the collective bargaining agreement unless statutory right to bargain is waived); and NLRB v. Jacobs Mfg. Co., 296 F.2d 680 (2nd Cir. 1952, Int'l. Woodworkers of America, Local 310 v. NLRB, 536 F.2d 786 (8th Cir. 1976) and NL Industries v. NLRB, 536 F.2d 786 (8th Cir. 1976) (prohibition of unilateral changes in mandatory subjects of bargaining include matters not discussed during negotiations of current agreement).

salary increases. ^{4/}

Turning to the alleged violation of D.C. Code Sec. 1-618.4 (a)(3), the Hearing Examiner concluded that "there [was] no specific evidence that UDC, in adopting its 40% policy for faculty step increases, was motivated by a desire to discourage membership in the Union." (R&R at 31.) The Hearing Examiner found that differences in the treatment of bargaining and non-bargaining-unit employees in the awarding of within-grade salary increases resulted from differences in their respective salary schedules and UDC's belief that "it was required by applicable policies and regulations to provide within-grade increases to [non-bargaining unit employees] with 'Satisfactory' or better evaluations." (R&R at 31.) He further concluded that the differences in treatment of bargaining and non-bargaining unit employees by UDC was not "inherently destructive to employee rights" and that absent proof of anti-Union motivation, there was no basis for finding the alleged Sec. 1-618.4(a)(3) violation. (R&R at 31.)

The Supplemental Report and Recommendation

Following exceptions filed by both parties to the Hearing Examiner's Report and Recommendation, the Board issued Opinion No. 215, wherein we granted UDCFA's exception to the Hearing Examiner's finding that UDC had no obligation to provide UDCFA with information necessary to establish the Sec. 1-618.4(a)(3) allegation, and remanded the matter to the Hearing Examiner with

^{4/} The Hearing Examiner concluded that the evidence established that "the UDC Administration had never before imposed a percentage limitation on the number, or amount, of such increases which could be granted." (R&R at 24.) This conclusion was reinforced by UDC's new "General Guidelines" for awarding step increases to faculty for AY '86-'87 issued since its April 15, 1980 guidelines.

The Hearing Examiner also rejected UDC's defense, that its "unilateral action was the result of budgetary restraints" noting that UDCFA did not request bargaining about "how much UDC should allocate[] for step increases... [r]ather, it requested bargaining about the impact of that decision on the procedures for granting such increases which UDC had determined unilaterally." (R&R at 28.)

instructions to act accordingly.^{5/} The receipt of the information prompted UDCFA to file two documents with the Board entitled "Petitioner's Response to Hearing Examiner's Order of April 5, 1989" and "Petitioner's Motion to Reopen the Record to Consider a New Exception to Hearing Examiner's Report and Recommendations in Light of Previously Undisclosed Information." UDC filed responses to these documents.

These filings resulted in the issuance of Opinion No. 239 where, in response to the former document, the Board made clear its remand Order in Opinion No. 215 and explicitly authorized "the Hearing Examiner to convene any necessary hearing and rule upon the parties' contentions with respect to the Sec. 1-618.4(a)(3) allegation." (Slip Op. No. 239 at p.2.) With respect to the second document, UDCFA had requested that the record be reopened to also consider, in view of the information it received, the Hearing Examiner's recommended remedy in his initial Report and Recommendation for the violations he found of Sec. 1-618.4(a)(1) and (5). The Board ruled that pursuant to Board rules requiring exceptions to be filed within 15 days of the service of the report, unless UDCFA could establish that the time limit should be tolled with respect to its additional exception, the record on the Sec. 1-618.4(a)(5) allegation was closed. Therefore, the Board also remanded this factual issue to the Hearing Examiner for a determination.

The hearing was reconvened on October 4, 1990,^{6/} and based

^{5/} The Board did not act on any of the other exceptions by the parties to the Hearing Examiner's Report and Recommendation. Consideration of the parties' remaining exceptions were held in abeyance so that the requested information could be provided and to permit the Hearing Examiner to "reevaluate the alleged violation of D.C. Code Sec. 1-618.4(a)(1) and (3) in light of this information and issue his findings thereon." Slip Op. No. 215 at p.1. On April 5, 1989, the Hearing Examiner "ordered [UDC] to submit to [UDCFA] the names and evaluation scores of all faculty who were members of the bargaining unit represented by the Complainant from FY '82 through '86, received 'Satisfactory' or better performance evaluations during that period, were eligible for step increases and did not receive them." (Hearing Examiner's April 5, 1989 Order to Respondent.)

^{6/} On September 24, 1990, UDCFA served UDC with a subpoena for certain information in preparation for the October 4, 1990 hearing on remand. On September 26, 1990, UDC filed a motion styled "Respondent's Motion for Protective Order" seeking to relieve it of any obligation to provide what it characterized as information which is "overly burdensome" and "not relevant or

on the additional evidence and arguments presented, the Hearing Examiner issued a Supplemental Report and Recommendation on March 28, 1991. He concluded that with respect to the Sec. 1-618.4(a) (3) allegation, his "additional findings [of fact] are not different from the initial ones which [he] took into account in reaching his conclusion that there was no specific evidence that UDC was motivated by a desire to discourage membership in the Union to support a violation." However, based on judicial decisions ^{7/} issued since his initial report, the Hearing Examiner reevaluated his reasoning and conclusion on "what constitutes employer action 'inherently destructive' to employee rights obviating the need to show actual anti-Union motivation, ...within the meaning of the holding in NLRB v. Great Dane Trailers, 388 U.S. 26 [(1967)]." (SR&R at 4.) Based on these decisions, the Hearing Examiner concluded that "[UDC's] decision to allow all eligible non-unit employees paid under different salary schedules to receive step increases, while limiting step increases to those in the bargaining unit whose entitlement was grounded in the Master Agreement necessarily was 'inherently destructive' to the rights of those in the bargaining unit." (SR&R at 5.) He further concluded that it was "unnecessary to look at whether Respondent [(UDC)] had a legitimate or substantial business justification for its action []" in concluding, upon reexamination, that UDC violated D.C. Code Sec. 1-618.4 (a)(1) and (3). (SR&R at 5 and 6.)

Finally, with respect to the issue of whether the time for filing additional exceptions to the finding of the Sec. 1-618.4(a)(5) violation should be tolled, the Hearing Examiner found that the time should not. He, therefore, recommended that UDCFA's request that the Board consider a new Sec. 1-618.4(a)(5)

(Footnote 6 Cont'd)

material" to the issues in these proceedings. (Resp. Mot. for Protective Order at p.2.) At the conclusion of the October 4, 1990 hearing, the parties reached an on-the-record agreement concerning the information requested in UDCFA's subpoena and UDC agreed to withdraw its Motion. (Tr. at p. 49-50.)

^{7/} The cases cited by the Hearing Examiner were decided pursuant to a provision under the NLRA, i.e., Section 8(a)(1) and (3), which proscribe, as an unfair labor practice, employer conduct nearly identical to that prohibited under Sec. 1-618.4 (a)(3) of the CMPA. Section 8(a)(1) and (3) of the NLRA provides: "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;... by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization...."

exception be denied. The Examiner based his recommendation on his conclusion that (1) his supplemental findings on the Sec. 1-618.4(a)(5) violation were "not much different from those in his initial Report" and (2) UDCFA's exception actually takes issue with the remedy originally recommended for the Sec. 1-618.4(a)(5) violation, not the findings of fact, and thus "[i]t could have been timely made after the issuance of the initial Report." (SR&R at 6.)

Exceptions were also filed to the Hearing Examiner's Supplemental Report and Recommendation by both Complainant and Respondent. We find no merit in any of the Exceptions made by UDCFA to the initial and Supplemental Report and Recommendation. However, with respect to the Hearing Examiner's conclusion in his Supplemental Report and Recommendation that UDC violated D.C. Code Sec. 1-618.4(a)(3), we find merit in UDC's Exceptions, which are more fully discussed below. As to all other issues, we adopt the Hearing Examiner's findings, conclusions and recommendations to the extent consistent with this Opinion.

UDCFA's Exceptions

UDCFA first excepts to the Hearing Examiner's denial of its request to reopen the record for a new exception to the initial Report and Recommendation. UDCFA claims that contrary to the conclusion of the Hearing Examiner, "there was no legitimate reason for the Union to [make the new exception] until it received the information by Respondent University... pursuant to the Order in PERB Opinion No. 215." (UDCFA Exceptions at 2.) We disagree.

Following Opinion No. 215, we issued Opinion No. 239 where we ruled that arguments for tolling the prescribed time for filing exceptions to the Sec. 1-618.4(a)(5) violation were factual and thus remanded the question to the Hearing Examiner to decide. (Opinion No. 239, supra, at 3.) The Hearing Examiner found the information provided did no more than further substantiate findings made in his initial report to which UDCFA could have timely excepted notwithstanding the receipt of the additional information from UDC. (SR&R at 4 and 6.) UDC's exceptions amounts to no more than disagreement with the Hearing Examiner's assessment of the evidence. UDCFA has presented no grounds for rejecting the Hearing Examiner's findings which we find are fully supported by the record. As we have stated previously, such issues of fact concerning "the relative weight and veracity accorded both testimonial and documentary evidence is for the Hearing Examiner to decide." American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works, DCR Slip Op. No. 266, at p.3,

PERB Case No. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). See also, American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works, DCR, Slip Op. No. 275, PERB Case No. 89-U-13 (1991) and American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO v. District of Columbia Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

UDCFA's only other exception to the Supplemental Report objects to the Hearing Examiner's failure "to order the University to grant within-grade salary increases to all faculty who were eligible for them in academic year...1986-87." (UDCFA Exceptions at 2.) This exception is no more than an attempt by UDCFA to have the Board consider the merits of the "new exception" discussed above, the substance of which is set forth in the margin below.^{8/} For the reasons we have stated above with respect to UDCFA's first exception, UDCFA has provided no basis for the Board's allowing and thus considering this exception. We therefore find it to be untimely filed pursuant to Board Interim Rule 109.22 (Now Board Rule 520.13).^{9/}

^{8/} In response to the information UDC provided pursuant to the Hearing Examiner's order, UDCFA's "new exception" claims that "the Hearing Examiner erroneously failed to order the University, as a remedy to: (1) rescind the unilateral changes, and (2) grant within grade increases in salary retroactive to August 16, 1986 to all faculty who were denied such increases for AY 86-87 but were eligible for them," or in the alternative that UDC "(1) rescind the unilateral changes... and (2) grant within grade increases in salary retroactive to August 16, 1986 to all faculty who would have received such increases at that time had the University followed the same procedures that it utilized in granting increases during the period from AY 1982-83 through AY 1984-85." (Petitioner's Motion To Reopen the Record to Consider A New Exception, p. 1-2.)

^{9/} With respect to the initial Report and Recommendation, UDCFA objects to the finding that faculty members of the College of Liberal and Fine Arts required a higher than "satisfactory" rating to be eligible for a step increase. The Hearing Examiner weighed the evidence and made this finding based on the transcript (Tr. II, p. 17, 55), and UDC exhibits. UDC presented no evidence to rebut this conclusion. This finding of fact is supported by substantial evidence in the record. As we have stated previously (see first exception discussion), the Hearing Examiner is in the best position to make findings that address, in part, the veracity of the evidence presented. In the absence of arguments compelling us to find to the contrary, such factual issues are for the

UDC's EXCEPTIONS ^{10/}

(Footnote 9 Cont'd)
Examiner to decide. We therefore find no grounds for this exception.

The remainder of UDCFA's Exceptions to the initial Report and Recommendation took issue with the Hearing Examiner's (1) findings of fact in support of his conclusion that Respondent UDC did not violate D.C. Code Sec. 1-618.4(a)(3), and (2) denial of UDCFA's request "to require UDC to identify by name and score all faculty who were members of the bargaining unit from FY '82 through FY '86, received 'Satisfactory' or better performance evaluations during that period, were eligible for step increases and did not receive them." (R&R at n.13.) Again, UDCFA has presented no grounds for rejecting the Hearing Examiner's findings concerning issues of fact with respect to UDC's violation of D.C. Code Sec. 1-618.4(a)(3), which we find fully supported by the record. With respect to the Hearing Examiner's denial of UDCFA's requested information, we agree with the Examiner that his "findings of fact and conclusion of law" make this information immaterial. The Hearing Examiner found that bargaining unit employees were treated differently by UDC with respect to awarding of step increases, however, he further found no evidence that UDC's actions were motivated by an intent "to discourage membership in the Union" a necessary element of a D.C. Code Sec. 1-618.4(a)(3) violation. (R&R at n.13 and p.31.) We therefore attach no significance to this Exception by UDCFA and find no basis for disturbing the Hearing Examiner's denial of UDCFA's request.

^{10/} In our Opinion No. 215 we remanded this case to the Hearing Examiner for the expressed purpose of permitting the Hearing Examiner to "reevaluate the alleged violation of D.C. Code Section 1-618.4(a)(1) and (3) in light of [] information" we deemed probative to this allegation, which we found had been improperly denied UDCFA. Opinion No. 215, supra at 1-2. In Opinion No. 239, we clearly stated that with respect to additional exceptions to the Hearing Examiner's finding of a violation of D.C. Code Sec. 1-618.4(a)(5), "the record on the D.C. Code Sec. 1-618.4(a)(5) allegation is closed" unless it could be established that there was a basis for tolling the time for filing exceptions as required by our Rules. UDC has not provided, nor are we aware of, any grounds for tolling the time for UDC to file supplemental or additional exceptions and supporting argument in a record we ruled was otherwise closed with respect to the Sec. 1-618.4(a)(5) allegation. Moreover, UDC's additional arguments are not based on changes in the prevailing state of the law since the time UDC filed its initial exceptions. We therefore dismiss as untimely any additional exceptions or supplemental arguments concerning the Sec.

UDC first excepts to what it alleges is the Hearing Examiner's reliance on notes taken by the UDCFA during the negotiation of the parties' Third Master Agreement. This objection is without relevance to the Hearing Examiner's finding of the D.C. Code Sec. 1-618.4(a)(5) violation. In the initial Report and Recommendation, the Hearing Examiner refers to notes taken during initial bargaining over the compensation portion of the collective bargaining agreement; however, the violative conduct concerns a mid-term modification, not matters discussed during contract negotiations. References to notes on bargaining history were not cited as the bases for concluding that there was an unfair labor practice. Furthermore, UDC did not dispute that the portions of the contract relating to within-grade salary increases were carried over unaltered from the previous contract.

The only significance of negotiation notes as it relates to this matter would be the issue of whether UDCFA waived its statutory right to bargain over within-grade salary increases; however, waiver is not now and never was raised by UDC as a defense. Moreover, the only harm implied by UDC appears to be the probative value accorded by the Hearing Examiner of UDCFA's notes. Although we find no specific reliance upon these notes in the Hearing Examiner's conclusions regarding the Unfair Labor Practice, this is nevertheless an issue properly within the Hearing Examiner's authority to decide.

UDC next objects to the finding that its new "General Guidelines" promulgating the 40% cap and a memorandum from the Director of Nursing Education ¹¹/ were implemented and used during AY '86-'87. UDC asserts that these documents were rescinded and that it acted in accordance with the then-effective contract provision and policy concerning within-grade salary increases, Article XV; Sec. A.5 and Title 409 of the Faculty

(Footnote 10 Cont'd)

1-618.4 (a)(5) violation filed by UDC subsequent to the exceptions it filed to the Hearing Examiner's initial Report and Recommendation. The exceptions addressed in the text above represent UDC's exceptions to the initial Report and Recommendation and to the Hearing Examiner's Supplemental Report and Recommendation regarding the newly-found D.C. Code Sec. 1-618.4(a)(1) and (3) violation.

¹¹/ This memorandum was distributed in December 1985, to bargaining unit faculty members in the Division of Nursing, College of Life Sciences requesting their participation "in the development of a set of criteria which will receive a consensus of the faculty... for Merit Increases" in the Division. (R&R at n.9.)

Personnel Policies, respectively. ^{12/} In support of this exception, UDC refers to an alleged stipulation between UDC and UDCFA that the new Guidelines were rescinded, and to UDC Exhibit 13. However, the transcript of the hearing is devoid of testimony pertaining to such a stipulation. No such stipulation appears anywhere in the record. UDC Exhibit 13 consists of certain faculty and administrative policies issued in 1980 but has no bearing on the issue of a subsequent policy concerning within-grade salary increases. In short, nothing appears in the record supporting UDC's alleged rescission of the disputed General Guidelines. Conversely, the evidence clearly supports the Hearing Examiner's finding. Moreover, notwithstanding UDC's contention that it acted in accordance with these provisions, the violative conduct found by the Hearing Examiner was UDC's unilateral promulgation of new Guidelines which featured the 40% cap. UDC does not dispute that the new Guidelines fail to conform with the policy then in effect set forth above.

UDC's third exception takes issue with the finding that UDC refused to bargain in good faith over compensation with UDCFA. UDC attempts to buttress its contention by referring to certain statements cited by the Hearing Examiner in the Report and Recommendation. These statements, however, refer only to negotiations during contract formation (of which there is no allegation or finding of a refusal to bargain) versus a mid-term unilateral change which is the subject of this Complaint. (R&R, p. 4-10). There is no legal or factual basis for this exception. (See discussion of first UDC Exception.)

The fourth UDC exception objects to the Hearing Examiner's finding that an existing policy or practice regarding the granting of increases was modified; upon which the Hearing Examiner based his conclusion that UDC violated D.C. Code Sec. 1-618.4

^{12/} Article VI, Sec. A.5 provides:

"5. The results of this evaluation process will help determine the terms and conditions of faculty contracts for the ensuing contract year."

The Hearing Examiner found that this provision (in effect during the period in question) undisputedly referenced UDC's policy on "Evaluation Ratings, Merit Increases, and Merit Bonuses", i.e., Title 409 of the Faculty Personnel Policies, which in relevant part states:

"All increments in salary are based solely on merit. Favorable ratings are not guarantees of merit increases but rather the basis for consideration for such awards..." (R&R at p.23.)

(a)(5). UDC contends that it "did not impose a percentage limitation on the amount or number of step increases which could be granted to faculty" rather "the available budget amount funded only permitted the awarding of a limited number of steps." (UDC Exceptions at p.4.) (See n. 3.) This argument misses the point that UDC nevertheless had an obligation to bargain upon UDCFA's request over the manner in which within-grade salary increases would be granted, notwithstanding the impact of budgetary constraints on UDC's continued conformance with the existing policy and practice. The remainder of UDC's argument under this exception reasserts the contentions contained in its second exception discussed above. For the foregoing reasons we find no merit to this exception.

UDC's final exception to the finding of a D.C. Code Sec. 1-618.4(a)(5) violation repeats a number of the previous objections, and in addition claims that the finding of a violation is predicated upon UDC's failure to budget for the within-grade salary increases, a nonnegotiable subject. For the reasons discussed above with respect to UDC's fourth exception, we find no merit to this contention. The finding of the Sec. 1-618.4(a)(5) violation, as observed by the Hearing Examiner, is not based on a failure to budget, but rather on the mid-term unilateral change in the manner in which within-grade increases are granted. (R&R at 28.)

We turn now to UDC's exceptions to the D.C. Code Sec. 1-618.4(a)(3) violation contained in the Supplemental Report and Recommendation. In view of the overlapping factual predicate for finding both the Sec. 1-618.4(a)(5) and Sec. 1-618.4(a)(3) violations, we shall approach UDC's eight indistinguishable exceptions by addressing UDC's supporting arguments which make specific reference to the Sec. 1-618.4(a)(3) violation. We consider first UDC's contention that the Hearing Examiner's finding of a violation based upon an "inherently destructive" analysis as espoused by the Court in Esmark, Inc. v. NLRB, 887 F.2d 739 (7th Cir. 1989) is misplaced. For it is upon this finding by the Hearing Examiner that most of UDC's remaining exceptions arise.

The basis of this contention, argues UDC, is that in Esmark the employer's action took the form of repudiating an entire collective bargaining agreement, whereas here it "concerned only a portion of the agreement [, i.e., provisions on awarding within-grade salary increases]." (UDC Exceptions at 16.) In reaching his conclusion that UDC's action was "inherently destructive", the Hearing Examiner cited the following passage from Esmark:

Two types of acts are considered 'inherently destructive.' First are actions which distinguish among workers based on their participation (or lack of participation) in a particular concerted action (such as a strike). On the other hand, conduct may be inherently destructive even though it does not divide the workforce into antagonistic factions, but instead 'discourages collective bargaining in the sense of making it seem a futile exercise in the eyes of employees.' (emphasis added.) Esmark, Inc. v. NLRB, 887 F.2d at 748-749. (Supp. R&R at 5)

The Hearing Examiner concluded that UDC's conduct fell into this definition when he quoted Esmark to describe UDC's unilateral action as having the effect of "sending a signal to employees that despite their diligent efforts to organize and bargain collectively, their contract may be disregarded." Id. (R&R at 5.) We do not concur, however, that the "inherently destructive" rationale of Esmark can be interpreted so broadly as to overcome the Hearing Examiner's findings in his initial Report and Recommendation, in which he concluded that UDC did not violate D.C. Code Sec. 1-618.4(a)(3).

In reaching his initial conclusion that a violation of D.C. Code Sec. 1-618.4(a)(3) did not exist under these facts, the Hearing Examiner, in his Report and Recommendation, made the following findings:

In this situation, there is no specific evidence that UDC, in adopting its 40% policy for faculty step increases, was motivated by a desire to discourage membership in the Union. Rather, it appears UDC treated the faculty differently from employees outside the bargaining unit because they were under different salary schedules and UDC believed it was required by applicable policies and regulations to provide within-grade increases to those with "Satisfactory" or better evaluations. By contrast, UDC considered step increases for faculty receiving such ratings were not automatic. In fact, the record shows in the College of Liberal and Fine Arts a higher than "Satisfactory" rating was needed to receive a step increase. Also, it appears that UDC applied the same policy to Learning Resources Division faculty within the bargaining unit who were under the same salary schedule as some non-bargaining unit employees. (emphasis added.) (R&R at 31.)

Critical to the Examiner's conclusion that UDC had not violated Sec. 1-618.4(a)(3) was his finding that "UDC treated the faculty [i.e., bargaining-unit employees,] differently from employees outside the bargaining unit because they were under different salary schedules...." ^{13/}

In reversing himself in the Supplemental Report and Recommendation, the Hearing Examiner expressly noted that his "additional findings are not essentially different from the initial ones which [he] took into account in reaching [the] conclusion that Respondent had violated...D.C. Code Sections 1-618.4(a)(1) and (3)." He further ruled that "[c]onsequently, they [i.e., the additional findings,] form no basis for the Hearing Examiner to change that conclusion." (SR&R at 4.) However, the Hearing Examiner, nevertheless, was apparently compelled to find a Sec. 1-618.4(a)(3) violation based on the decision in Esmark. In so doing the Hearing Examiner concluded the following:

...both bargaining unit faculty and non-faculty employees outside the unit were in essentially the same circumstances in that all those who were eligible, and met certain criteria, were entitled to receive step increases. In this respect, the only distinction between them was the basis of that entitlement. For one group, it came from applicable regulations and UDC policy, while that of bargaining unit faculty sprang from the third Master Agreement. Respondent's decision to allow all eligible non-unit employees paid under different salary schedules to receive step increases, while limiting step increases to those in the bargaining unit whose entitlement was grounded in the Master Agreement necessarily was "inherently destructive" to the rights of those in the bargaining unit. (SR&R at 5.) (emphasis added.)

^{13/} Among the findings the Hearing Examiner made in reaching this conclusion was the fact that bargaining unit employees who were on the same salary schedule, i.e., administrative schedule, as non-bargaining unit employees were subject to the same "policies and regulations" promulgated by UDC with respect to that salary schedule. (August 11, 1987 Tr. at 51. and R&R at 31.) Included among these policies was an April 3, 1985 instructional memorandum which, inter alia, included a provision characterizing step increases as automatic unless expressly advising the UDC Personnel Office otherwise. (Un. Exh. No. 29)

The Hearing Examiner provides no explanation, nor do we find any in the record to support the reversal of his initial finding, i.e., that UDC's action with respect to awarding step increases was based on non-discriminatory policies and regulations associated with the respective salary schedules of bargaining and non-bargaining-unit employees. The "distinction" noted by the Hearing Examiner in his Supplemental Report was a previously existing one which clearly did not serve to overcome his initial finding that UDC acted pursuant to "different salary schedules."

In our view, nothing in Esmark compels a different conclusion concerning the same established record evidence. Nor do we find any basis in the record for the conclusion reached by the Hearing Examiner in his Supplemental Report and Recommendation, with respect to the alleged Sec. 1-618.4(a)(3) violation. We therefore must reject the Hearing Examiner's supplemental findings that UDC's modification of its policy and practice under which it awarded employees within-grade salary increases was, pursuant to Esmark, "inherently destructive" to bargaining unit employees. ^{14/}

In so doing, we adopt the Hearing Examiner's findings and conclusions with respect to the alleged 1-618.4 (3) violation contained in his initial Report, which we find fully supported by the record. There, he found "there [was] no specific evidence that UDC, in adopting its 40% policy for faculty step increases, was motivated by a desire to discourage membership in the Union." (R&R at 31.) Rather, he concluded, UDC treated faculty bargaining unit employees differently because they were under different salary schedules. Clearly, in our view, such conduct does not fall within the parameters of "inherently destructive" as articulated by the Court in Esmark. Finally, the Hearing Examiner concluded, consistent with the burdens of proof for this type of violation ^{15/}, that in the absence of evidence to the

^{14/} In view of our rejection of the Hearing Examiner's findings and conclusions in his Supplemental Report, with respect to the alleged D.C. Code Sec. 1-618.4(a)(3) violation, the necessity to determine the remainder of UDC's Exceptions in this regard is obviated and therefore we have no occasion to rule upon them.

^{15/} In the Hearing Examiner's Supplemental Report, he found UDC's conduct was necessarily "inherently destructive" as defined by the Court in Esmark, Inc., supra, which we now reject for the reasons stated in the text. The Hearing Examiner further concluded, erroneously, that "it [was] unnecessary to look at whether Respondent [UDC] had a legitimate or substantial business

contrary, any implication of unlawful motivation by UDC was overcome by evidence of lawful motivation. (R&R at 30-31.)

UDC's final exception objects to the Hearing Examiner's recommended remedy as set forth in his Supplemental Report and Recommendation with respect to his finding of a violation of Sec. 1-618.4(a)(1) and (5). UDC argues that Sections 2(b) and (c) of the recommended remedy which calls for UDC to (1) "apply the procedures for awarding incremental step increases in salary for AY '86-'87 which were in effect under the third Master Agreement prior to November 21, 1985" and (2) "[m]ake whole, with interest at 6% all employees in the bargaining unit who otherwise would have received step increases in salary for AY '86-'87...", respectively, amounts to a drastic revision of his initial recommended remedy and not, as the Hearing Examiner stated, a clarification. (SR&R at 6 and 7.) (UDC Exceptions at 17.)

UDC's exception to the Hearing Examiner's characterization of his remedy in the Supplemental Report and Recommendation as a clarification of the D.C. Code Sec. 1-618.4(a)(5) remedy which he proposed in his initial Report and Recommendation is well-taken. Indeed the cited provisions are actually supplemental to the remedy first proposed. However, the provisions merely propose to restore the status quo ante consistent with the Board's authority to "make whole" those "who the Board finds has suffered adverse economic effects in violation of this subchapter, [i.e., the Labor-Management Relations section of the CMPA.]" D.C. Code Sec. 1-618.13(a). We have ruled that status quo ante remedies are appropriate relief for those employees affected by an unlawful unilateral change in their terms and conditions of employment in violation of D.C. Code Sec. 1-618.4(a)(5). See, Fraternal Order

(Footnote 15 Cont'd)
justification for its action." (SR&R at 5.) Nothing in Esmark altered the approach articulated by the Court in NLRB v. Great Dane Trailers, Inc. supra, under an "inherently destructive" rationale to determine whether a violation of this nature has been established. The Court in Great Dane, quoting Labor Board v. Brown, 380 U.S. 276 (1965), stated, "[i]f the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing 'his actions as something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.'" Great Dane Trailers, Inc., 388 U.S. at 33. Having found no basis for finding UDC's conduct "inherently destructive" under Esmark, absent evidence to the contrary, we find no basis for disturbing the Hearing Examiner's conclusion in his initial Report that UDC's actions were motivated by legitimate business reasons. (R&R at 31.)

of Police, Metropolitan Police Department Labor Committee and International Association of Firefighters, Local 36 v. District of Columbia Office of Labor Relations and Collective Bargaining, 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 84-U-15 and 85-U-01 (1984) and Cf., NLRB v. Keystone Steel & Wire, 653 F.2d 304 (7th Cir. (1981)). During these unfair labor practice proceedings, the Hearing Examiner is the designated agent of the Board empowered to make findings, conclusions and recommendations (which include proposed remedial orders) consistent with the Board's statutory authority under the CMPA.^{16/} We find nothing in these remedial provisions proposed by the Hearing Examiner that is inconsistent with that authority. See D.C. Code Sec. 1-605.2(11) and 1-618.2(a) and Board Rules 520.12, 550.12 and 556.1.^{17/}

^{16/} UDC cites a passage in the initial Report and Recommendation which it asserts indicates that UDCFA was not seeking the remedy which the Hearing Examiner now provides (UDC Exceptions at 18.):

"The Union is not seeking to bargain about UDC's resulting decision, as to how much should be allocated for step increases to faculty for AY '86-'87. Rather, it requested bargaining about the impact of that decision on the procedures for granting such increases which UDC determined unilaterally." (R&R at 28.)

We do not disagree with UDC's assessment of this passage, however, the Hearing Examiner's reference is to what UDCFA sought to bargain over at the time of the violation. What an employer is legally obligated to bargain over is not necessarily controlling over the appropriate relief once it is determined that it has violated that obligation. In short, UDC's unlawful refusal to bargain over the above-quoted terms and conditions of employment and unilateral change in the same compounded the adverse economic impact suffered by affected bargaining-unit employees.

^{17/} UDC also asserts that since the conduct in question was a unilateral change, UDC "should be required to negotiate the change but not be required to allocate funds it does not have and never did have." (UDC Exceptions at 19.) UDC cannot be permitted to exploit its prohibited conduct by simply ordering it to bargain upon request when it should have met this obligation at the time of the violation. Moreover, it is impossible to determine at this time what procedures for granting within-grade salary increases would have resulted if UDC had not unilaterally changed the existing one but rather met its obligation to bargain at that time. We further note that the Hearing Examiner found, contrary to UDC's

However, with respect to 2(c) of the recommended remedy, the D.C. Superior Court has held that an "award requiring ...employee[s] be given back pay for a specific period of time establishes...a liquidated debt" and therefore is subject to the provisions of D.C. Code Sec. 15-108 which provides for prejudgment interest on liquidated debts at the rate of four percent (4%) per annum. See American Federation of Government Employees, Local 3721 v. District of Columbia Fire Department, 36 DCR 7857, PERB Case No. 88-U-25 (1989) and American Fed. of State, County and Municipal Employees v. District of Columbia Bd. of Education, D.C. Superior Court. Misc. Nos. 65-86 and 93-86, decided Aug. 22, 1986, reported at 114 Wash. Law Reporter 2113 (October 15, 1986). We, therefore, shall modify this provision of the recommended remedy accordingly.

For the foregoing reasons, we reject the recommendations of the Hearing Examiner that Respondent UDC be found to have violated D.C. Code Sec. 1-618.4(a)(3) by discriminating with respect to bargaining-unit employees' terms and conditions of employment and that this discrimination had the effect of discouraging membership in UDCFA. With respect to the alleged violation of D.C. Code Sec. 1-618.4(a)(5), we adopt the Hearing Examiner's recommendation that UDC unilaterally determined terms and conditions of bargaining-unit employees and that by this action UDC has failed and refused to bargain collectively in good faith with the exclusive representative of these employees, UDCFA. We also find that by this same action, UDC has interfered with, restrained and coerced bargaining-unit employees in the exercise of rights guaranteed them under the CMPA in violation of D.C. Code Sec. 1-618.4(a)(1). AFSCME, Local 2776 v. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

With respect to the Hearing Examiner's proposed remedy, we adopt it in its entirety. We realize, however, that achieving compliance with provisions 2(b) and (c) is not free of practical and administrative complexities. We shall therefore direct the parties to meet within 14 days of the date of this Order to discuss this relief issue, to reach agreement regarding it, if possible, and to provide a written report to the Board within 19 days of the date of this Order regarding the results of this discussion. If agreement has not been reached, the parties will

(Footnote 17 Cont'd)

claim, that "UDC should have [had] savings from other sources to fund them [, i.e., salary increases]" at the time of the violation. (R&R at 28.)

include in their respective reports specific practical recommendations as to how best to achieve compliance with this part of the granted relief.

The Board shall retain jurisdiction over this matter until issuance of a Supplemental Order resolving these remedial issues.

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia (UDC) shall cease and desist from refusing to bargain, upon request, about the procedures for granting within-grade salary increases with the University of the District of Columbia Faculty Association/NEA (UDCFA).
2. UDC shall cease and desist from unilaterally implementing changes in terms and conditions of employment concerning within-grade salary increases without first notifying and, if requested, bargaining with UDCFA.
3. UDC shall not in any like or related manner interfere with, restrain, or coerce employees represented by UDCFA in the exercise of rights guaranteed them by the Comprehensive Merit Personnel Act (CMPA).
4. UDC shall negotiate in good faith with UDCFA, upon request, with respect to procedures and the impact and implementation of decisions resulting from budgetary constraints as it relates to salary, wages, and within-grade salary increases.
5. Representatives of UDC and UDCFA shall meet within fourteen (14) days of the date of this Order to work out an appropriate and practical method and means for making whole, with interest at 4% per annum, all employees in the bargaining unit who would have received step increases in salary for AY '86-'87, pursuant to procedures for granting within-grade step increases in salary which were in effect under the Third Master Agreement, prior to November 21, 1985.
6. The parties shall provide a written report to the Board within nineteen (19) days of the Order detailing the results of their discussion. If agreement has not been reached, the parties will include in the report their specific recommendations on how best to achieve the objectives of paragraph 6 above.

7. UDC, within fourteen (14) days from the service of this Decision and Order, shall post the attached Notices conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.
8. UDC shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that Notices have been posted accordingly.

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

March 10, 1992

CERTIFICATE OF SERVICE

I hereby certify that the attached Decision and Order in PERB Case No. 86-U-16 was hand-delivered, sent via facsimile transmission and/or mailed (U.S. Mail) to the following parties on this 10th day of March, 1992:

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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

_____)
 In the Matter of:)
)
 University of the)
 District of Columbia,)
 Faculty Association/NEA,)
)
 Complainant,)
)
 v.)
)
 University of the)
 District of Columbia,)
)
 Respondent.)
 _____)

PERB Case No. 86-U-16
Opinion No. 285
(Supplemental Order)

ORDER

On May 18, 1992, the Public Employee Relations Board (Board) issued an Order in Opinion No. 314, in the above-captioned proceeding, granting the parties leave until June 14, 1992, to provide the Board with a final report including their recommendations on how best to achieve the objectives contained in paragraph 5 ^{1/} of our Decision and Order in Opinion No. 285. We further ordered that if agreement was not reached between the parties, each party was to provide the Board with a final report containing their respective recommendations. Finally, we reiterated what we had stated in Opinion No. 285, that following consideration of the parties' report(s), the Board shall issue a Supplemental Order to Opinion No. 285 establishing the final remedy in accordance with the remedial objectives set forth in that Opinion.

^{1/} Paragraph 5 of our Order in Opinion No. 285 provides as follows:

Representatives of UDC and UDCFA shall meet within fourteen (14) days of the date of this Order to work out an appropriate and practical method and means for making whole, with interest at 4% per annum, all employees in the bargaining unit who would have received step increases in salary for AY '86-'87, pursuant to procedures for granting within-grade step increases in salary which were in effect under the Third Master Agreement, prior to November 21, 1985.

Through their obviously diligent endeavors, the parties were successful in reaching an agreement on how to achieve the aforementioned remedial objectives. On June 23 and July 2, 1992, the parties filed two joint reports entitled "Report of the Parties" and "Supplemental Report of the Parties," respectively, which set forth the terms of that agreement.^{2/} The parties' proposed remedy has been adopted by the Board and incorporated into this Order as follows:

1. After reviewing records for each faculty member, the parties have concluded that 241 faculty members -- 75 professors, 72 associate professors, 88 assistant professors, and 6 instructors -- are entitled to relief. However, the parties acknowledge that, despite their best efforts, it is conceivable that a few eligible faculty may have been overlooked and a few faculty may have been erroneously placed on the list of those entitled to relief. Thus, the parties have agreed that the Union will notify all individuals who were members of the faculty bargaining unit in AY 1986-87, and either inform them of their entitlement to the relief in question or explain why they have been deemed to be not entitled to such relief. The notices to those whom the parties have deemed to be not entitled to the relief shall indicate the reason(s) for the non-entitlement, and shall afford those individuals the opportunity to challenge that determination. Such challenges shall be addressed to the Union and shall state the grounds on which the individuals believe they were entitled to the relief. If the Union concludes that any of the challenges are meritorious, it shall present them to the University. The parties then will examine the relevant documentation and attempt to agree on the eligibility of each individual.

2. In order to provide such notification, the Union will require the assistance of the University. Specifically, the Union does not have the current or last-known home addresses of many of the faculty who were in the bargaining unit during AY 1986-87 and who, therefore, are or might

^{2/} Due to circumstances beyond their control, the parties could not comply with the deadline for their submissions. They jointly requested and were granted a brief extension of time by the Board's Executive Director to finalize and file the reports.

be eligible for the relief in question. Accordingly, the University agrees to provide the Union with the current or last-known home addresses, as appropriate, of all members of the faculty bargaining unit during AY 1986-87 or their estates, as appropriate.

3. Subject to the caveats contained in the previous section of this submission, the parties have identified the faculty eligible for relief. The University has completed tracing most of those individuals' subsequent (*i.e.*, post-AY 1986-87) employment history to determine exactly how much money each individual is owed. As soon as that task is completed and any final adjustments are made to the list, the University and the Union will discuss the results of the University's investigation before the Union sends the above-mentioned notices to the eligible faculty.

4. The University will pay to all eligible faculty the back pay, retirement contribution and applicable interest at four percent (4%) per annum due and owing under the PERB Order as soon as the requisite funds are available, but in any event, agrees that payment in full to all recipients shall be completed not later than December 15, 1994.

5. The parties agree that the "aggregate amount due under the PERB Order" is the total amount of back pay, retirement contribution, and interest at 4% per annum on back pay and retirement contribution, due on May 15, 1992. The parties also agree that "eligible faculty" are faculty who were eligible for within-grade salary increases in Academic Year 1986-87 but did not receive such increases due to the University's violation of D.C. Code Sections 1-618.4(a)(1) and (a)(5), as found by the PERB in this proceeding.

6. In addition to the interest that is part of the aggregate amount due under the PERB Order, the parties also agree that, in accordance with the provisions of the PERB Order, all payments or partial payments, of the aggregate amount due under the PERB Order will include additional interest at the rate of 4% per annum from May 15, 1992, until the 15th day of the month in which the payment or partial payment is made.

7. The University agrees that it will submit a supplemental budget request in FY 1993 for the specific appropriation of additional funds sufficient to pay the entire unpaid balance owed to eligible faculty under the PERB Order. In any event, the University agrees to pay a total of one-third (1/3) of the aggregate amount due under the PERB Order on or before December 15, 1992, as follows:

(a) This payment will include all contributions due to TIAA/CREF included in the aggregate amount due under the PERB Order, plus additional interest due under [paragraph 6] above; and

(b) The difference between the amount paid for TIAA/CREF under Section [7](a) and one third (1/3) of the total aggregate amount due under the PERB Order will be paid to eligible faculty as a partial payment of the back pay and interest due in a pro rata lump sum distribution to each eligible faculty member. This payment will also include additional interest due under [paragraph 6] above.

8. The University will include in its FY 1994 budget request an amount sufficient to pay the balance of the aggregate amount due under the PERB Order. If the FY 1994 appropriation is insufficient to cover the balance due, the University will submit a supplemental budget request in FY 1994 for the specific appropriation of additional funds sufficient to pay the entire unpaid balance owed to eligible faculty under the PERB Order. In any event, the University agrees to pay a total of one-half (1/2) of the balance of the aggregate amount due under the PERB Order on or before December 15, 1993. This amount will be paid to eligible faculty as a second partial payment of the back pay and interest due in a pro rata lump sum distribution to each eligible faculty member. This payment will also include additional interest due under [paragraph 6], above.

9. The University will include in its FY 1995 budget request an amount sufficient to pay the balance of the aggregate amount due under the PERB

Order. If the FY 1995 appropriation is insufficient to cover the balance due, the University will submit a supplemental budget request in FY 1995 for the specific appropriation of additional funds sufficient to pay the entire unpaid balance owed to eligible faculty under the PERB Order. In any event, the University agrees to pay the entire remaining balance of the aggregate amount due under the PERB Order on or before December 15, 1994. This amount will be paid to eligible faculty as a final partial payment of the back pay and interest due in a lump sum distribution to each eligible faculty member. This payment will also include additional interest due under [paragraph 6] above.

This agreement between the parties embodied by this Order represents the complete and final remedy with respect to resolving all of the objectives set forth in paragraph 5 of our Decision and Order in Opinion No. 285. The Board will maintain limited jurisdiction with respect to issues concerning compliance with and enforcement of this Order. Any dispute that may arise between the parties concerning issues outside the scope of this limited jurisdiction, over which the parties cannot reach agreement, should be resolved by the agreed-upon methods or means the parties have negotiated for resolving disputes arising from the parties' collective bargaining agreement.

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

July 16, 1992