Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, Local 383,	)	PERB Case Nos. 13-U-06
Complainant,	)	
	)	Opinion No. 1577
v.	)	
District of Columbia Department of Youth Rehabilitation Services,	)	
Respondent.	)	

DECISION AND ORDER

Complainant American Federation of Government Employees, Local 383 ("AFGE Local 383") filed an unfair labor practice complaint against the District of Columbia Department of Youth Rehabilitation Services ("DYRS") alleging that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by engaging in direct dealing; by implementing an employee conduct policy ("Policy") without first engaging in substantive bargaining; and by failing to negotiate in good faith over the impact or effects of, and procedures concerning the implementation of the Policy ("I&E bargaining").[1]

On January 24, 2014, PERB issued a Decision and Order[2] ("Slip Op. No. 1449") that sustained some of AFGE Local 383's allegations, dismissed other allegations, and referred the remaining allegations to be analyzed by a hearing examiner. The Hearing Examiner's Report and Recommendation ("Report"), now complete, is before the Board for consideration.

For the reasons stated more fully below, the Board affirms the Hearing Examiner's dismissal of AFGE Local 383's direct dealing allegation, as well as his finding that DYRS committed an unfair labor practice by failing to negotiate in good faith during I&E bargaining. However, the Board rejects the Hearing Examiner's findings that, under the facts of this case, the dress code portion of the Policy was a mandatory subject of bargaining; and that DYRS'

[1] *See Am. Fed'n of Gov't Emp., Local 631, et al. v. D.C. Gov't, et al.*, 62 D.C. Reg. 14666, Slip Op. No. 1541, PERB Case No. 09-U-31 (2015).
[2] *Am. Fed'n of Gov't Emp., Local 383 v. D.C. Dep't of Youth Rehab. Serv.*, 61 D.C. Reg. 1561, Slip Op. No. 1449, PERB Case No. 13-U-06 (2014).

unilateral adoption of the dress code therefore violated D.C. Official Code §§ 1-617.04(a)(1) and (5). Further, the Board rejects the Hearing Examiner's findings that the Policy's prohibition against having outside contact with youth who were under DYRS' care, or their families, for three years exceeded the scope of the DCMR, and that DYRS' unilateral adoption of that provision therefore violated §§ 1-617.04(a)(1) and (5).

I. Slip Op. No. 1449

AFGE Local 383's Complaint raised ten distinct allegations: 1) that DYRS engaged in direct dealing; 2) that DYRS unilaterally implemented and failed to bargain substantively over the Policy's (a) prohibition against employees using harsh, coarse, or threatening language; (b) regulations of outside speeches and writings; (c) prohibition of posting in workplaces without preapproval; (d) dress code; (e) requirement that employees self-report serious violations of the law; (f) prohibition against outside personal or social media contact with youth under DYRS care, or their families, for three years after the youth leaves DYRS custody; and (g) prohibition against borrowing or lending money between co-workers; 3) that the Policy is overly broad, vague, etc.; and 4) that DYRS failed to engage in good faith I&E bargaining.

In Slip Op. No. 1449, the Board rejected and dismissed AFGE Local 383's allegations that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing and failing to bargain substantively over the Policy's prohibition against employees using harsh, coarse, or threatening language; its regulations of outside speeches and writings; and its requirement that employees self-report serious violations of the law.[3] The Board noted that under D.C. Official Code § 1-617.08(a)(1), "management maintains the sole right to 'direct employees of the agencies,' 'in accordance with applicable laws, rules, and regulations."[4] The Board held that an agency does not violate D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing to engage in substantive bargaining with an exclusive representative over a management rights decision that is in harmony with the DCMR (or other similar applicable law) because the decision is protected under the "applicable laws and rules and regulations" clause of D.C. Official Code § 1-617.08(a)(1).[5] Thus, since the Policy's prohibition against harsh, coarse, or threatening language, as well as its provision regulating public speech and writings, and its requirement to self-report serious violations of law all corresponded to similar provisions and requirements in the DCMR,[6] the Board found that those portions of the Policy were protected as management rights under D.C. Official Code § 1-617.08(a)(1). Accordingly, the Board held that

[3] *Id*. at 6-7, 9-10.
[4] *Id*.
[5] *Id.* (citing *Washington Teachers Union, Local 6 v, D,C, Pub. Sch.*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995); and *Douglas, et al. v. Dixon, et al.*, 39 D.C. Reg. 9621, Slip Op. No. 315 at p. 2, PERB Case No. 92-U-03 (1992)).
[6] The prohibition against abusive language corresponded to the then versions of 6-B DCMR § 1603.3(g) (now repealed) and § 1619.1 (now § 1607(a)(16)). The provisions governing public speech and writings corresponded to the then version of 6-B DCMR §§ 1804 *et seq*. (now §§ 1807 *et seq.*). The requirement to self-report serious violations of the law corresponded to the then versions of 6-B DCMR § 423.3 and §§ 418.1(c)(1) – (9) (now partially § 416.4 and §§ 416.2(c)(1) – (9), respectively).

DYRS did not violate D.C. Official Code §§ 1-617.04(a)(1) and (5) when it refused to substantively bargain over those portions of the Policy with AFGE Local 383, and dismissed the allegations.[7] The Board noted, however, that DYRS was still obligated to engage in good faith I&E bargaining over those portions of the Policy pending a timely request by AFGE Local 383.[8]

With regard to AFGE Local 383's allegations that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing and failing to bargain substantively over the Policy's prohibitions of posting in workplaces without preapproval and against borrowing or lending money between co-workers, the Board found that those portions of the Policy went beyond the scope of the DCMR.[9] Thus, the Board found that they were not "in accordance with applicable laws, rules, and regulations" and were therefore not protected as management rights under D.C. Official Code § 1-617.08(a)(1). Accordingly, the Board found that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented those portions of the Policy without first engaging in substantive bargaining with AFGE Local 383, and ordered the parties to return to positions of *status quo ante* until such time as the parties engage in substantive bargaining over those issues.[10] Further, the Board ordered DYRS to cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5), and to post a notice explaining its violations.[11]

Addressing AFGE Local 383's allegation that the Policy was "overly broad, vague, ambitious, [and] not narrowly tailored to meet the Agency's legitimate and necessary objectives," the Board noted that AFGE Local 383 did not provide—nor could the Board find—any legal authority to support that assertion. Accordingly, the Board dismissed the allegation.[12]

Finally, the Board noted that AFGE Local 383's allegations concerning direct dealing, the Policy's dress code and no-contact provisions, and DYRS' alleged failure to engage in good faith I&E bargaining each raised questions of fact.[13] Therefore, the Board ordered each of those allegations to be addressed by an unfair labor practice hearing.

II. The Hearing Examiner's Report and Recommendation

The hearing in this matter was held on June 17, 2014.[14] In his Report, the Hearing Examiner made the following findings of facts and conclusions.

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[7] Slip Op. No. 1449 at 6-7.
[8] *Id*. at 6-7, 10 (citing *D.C. Nurses Ass'n v. D.C. Dep't of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012)).
[9] *Id.* at 7-8, 11.
[10] *Id*. at 8. 11.
[11] *Id*. at 13-14.
[12] *Id*. at 9.
[13] *Id*. at 5-6, 8-9, 11-12.
[14] HE Report at 5.

A. Direct Dealing

The Hearing Examiner found that "[t]he Union did not present any evidence in support of its allegation of direct dealing...." Accordingly, he "accepted the Union's withdrawal of that allegation" at the close of the hearing.[15]

B. Failure to Engage in Good Faith I&E Bargaining

On September 5, 2012, DYRS notified its employees by email that it was implementing a new Employee Conduct Policy, effective September 4, 2012.[16] That same day, AFGE Local 383 sent an email to DYRS management and to the Office of Labor Relations and Collective Bargaining ("OLRCB") demanding "decisional [i.e. substantive] bargaining" over the Policy.[17]

The parties first met on September 25, 2012. AFGE Local 383 was represented at the meeting by its President, Timothy Traylor, and its attorney, Brenda Zwack. DYRS was represented by two OLRCB attorneys, Dean Aqui and Nina McIntosh. No management officials from DYRS were present.[18] AFGE Local 383's representatives stated that they were going to leave and reschedule until a time when a DYRS management official could attend, but OLRCB's attorneys encouraged them to stay to at least voice their concerns about the Policy. Mr. Traylor testified that he agreed, but that he made it clear to OLRCB that AFGE Local 383 was merely voicing its concerns, and was not engaging in I&E or substantive bargaining.[19] Mr. Aqui testified that DYRS considered the meeting to be an I&E bargaining session.[20] The Hearing Examiner credited Mr. Traylor's testimony over Mr. Aqui's regarding the purpose of the meeting based on his analysis of Mr. Traylor's and Mr. Aqui's deliveries and demeanors, as well as an email exchange between the Director of DYRS and Mr. Traylor discussing what the purpose of the September 25th meeting would be. [21]

On November 16, 2012, a second meeting was held.[22] Mr. Traylor and Ms. Zwack represented AFGE Local 383 along with two shop stewards. Mr. Aqui and Kathryn Naylor from OLRCB and four members of DYRS' management represented DYRS.[23] At the meeting, AFGE Local 383 submitted several proposals. However, DYRS' representatives asserted that they were not authorized to make any final decisions and that they would have to take all of

[15] *Id*. at 7.
[16] *Id*. at 5.
[17] *Id*. The Board notes that in Slip Op. No. 1449, it was stated that "the parties dispute whether a timely request to bargain was made…." In actuality, the timeliness of AFGE Local 383's September 5, 2012 demand to bargain was not in question. *See* Complaint at ¶ 10; *and* Answer at ¶ 10. This is evidenced by the fact that the parties willingly met on September 25 and November 16, 2012, to bargain over the Policy. Rather, the dispute was over whether the parties had met to engage in substantive bargaining over the Policy, or whether they had met to engage in I&E bargaining over the Policy. Answer at ¶ 10.
[18] HE Report at 5.
[19] *Id*. at 5-6.
[20] *Id*. at 6.
[21] *Id*.
[22] *Id*.
[23] *Id*.

AFGE Local 383's proposals back to DYRS for more careful consideration.[24] Additionally, DYRS' representatives did not ask to caucus even once to consider any of AFGE Local 383's proposals, nor did they make any counter-offers.[25] Mr. Traylor testified that he felt DYRS had given AFGE Local 383 the "runaround."[26] He further testified that when he asked DYRS' representatives if any of them had the authority to finalize any agreements that day, DYRS' representatives either did not respond or could not decide if any of them had the authority to bind DYRS.[27] AFGE Local 383 then abruptly left the meeting. Mr. Aqui's final note from the meeting states, "Union walked out because we would not say that we could/would change the policy right here and now."[28]

Based on his analysis of the record, the Hearing Examiner concluded that "DYRS violated the requirements of good faith bargaining on September 25 and November 16 by sending to the bargaining table representatives with insufficient authority to engage in meaningful negotiations."[29] The Hearing Examiner found that "Mr. Traylor's collective bargaining experience taught him to expect to meet members of agency management at the bargaining table who had sufficient authority to bind their agency to a contract." By not having any agency personnel at the September 25th meeting, and by not having anyone at the November 16th meeting who could commit DYRS to an agreement right then and there, the Hearing Examiner found that DYRS "frustrated the Union's efforts to engage in meaningful bargaining regarding the provisions of [the Policy], and their impact and effect on Local 383's bargaining unit, and thereby violated D.C. [Official] Code §§ 1-617.04(a)(1) and (5)."[30]

C. Dress Code

The Hearing Examiner noted that 4 DCMR §§ 513.1-2 permit District agencies to "prescribe standards of appearance or dress for personnel which serve a reasonable business purpose; for example, to identify its employees to the public by means of a distinctive uniform, or to maintain a neat and clean appearance, [or] in order to prevent a danger to the health, welfare, or safety of employees or customers." The Hearing Examiner further noted that D.C. Official Code § 1-617.08 "grants DYRS the sole right to direct its employees in accordance with applicable law."[31]

Based on testimony from DYRS' witness, Quiyana Hall, the Hearing Examiner found that "DYRS adopted the new policy in 2012 because of safety or security incidents."[32] Additionally, the Hearing Examiner noted the distinctions between the content and applicability of DYRS' 2004 dress code, DYRS' 2010 case management manual, and the 2012 dress code

[24] *Id*. at 7.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*. at 12.
[30] *Id*.
[31] *Id*. at 8.
[32] *Id*. at 9.

DYRS adopted as part of its new Employee Conduct Policy.[33] The Hearing Examiner found that the 2012 dress code, "for the first time, sets forth specific clothing restrictions in detail, and extends beyond attire to body adornments such as tattoos, rings, and earrings and to fingernails."[34] He further found that the 2012 version applied to all "DYRS staff" wherever they work, whereas the 2004 version applied to "all Youth Services Administration Employees, volunteers, and staff assigned to secure facilities or group or shelter homes by other units, agencies or departments."[35] Moreover, the Hearing Examiner noted that the 2004 dress code stated that employees who violated the policy would be sent home on annual leave until they returned in suitable attire, but made no mention that violations might result in discipline. He noted that the 2010 case management manual did not have any provisions about being sent home or being disciplined. The 2012 dress code, however, stated that violators of the Policy would be sent home on annual leave and that subsequent violations could result in discipline.[36]

Finally, the Hearing Examiner noted that Mr. Aqui, on behalf of DYRS, refused to bargain substantively over the dress code, but stated that DYRS would "[o]f course … entertain a demand for impact and effects bargaining on the new provisions."[37]

Based on his factual findings, and relying on NLRB case law, the Hearing Examiner concluded that "the 2012 dress code differed materially, substantially and significantly from the 2004 dress code and the 2010 [case management manual's] requirements and therefore was a mandatory subject of bargaining."[38] The Hearing Examiner further concluded that "DYRS' refusal to bargain with Local 383, and its unilateral implementation of the 2012 dress code also violated D.C. [Official] Code §§ 1-617.04(a)(1) and (5)."[39]

D. Prohibition of Outside Contact With Youth After Release from DYRS Custody

The Hearing Examiner noted that in 2012, the then version of 6-B DCMR § 1800.1 (now partially § 1800.2) required District employees to "at all times maintain a high level of ethical conduct in connection with the performance of official duties," and to "refrain from taking, ordering, or participating in any official action which would adversely affect the confidence of the public in the integrity of the District government."[40] He further noted that the then version of § 1800.2 stated that "[t]he maintenance of unusually high standards of honesty, integrity,

[33] *Id*. at 8-9.
[34] *Id*.
[35] *Id*. The Board notes that it appears the Hearing Examiner interpreted the quoted language from the 2004 dress code to mean that its restrictions only applied to those people who worked in DYRS' secure facilities. However, the Board reads the language to mean that it was applicable first to "all" DYRS staff regardless of where they worked in DYRS, then to any volunteers regardless of where they worked in DYRS, and then to any staff from other agencies who were assigned to DYRS' secure facilities or group or shelter homes. Nevertheless, since the exact meaning 2004 language is not relevant in light of the Board's ultimate holding in this Decision and Order regarding the 2012 dress code, the Board finds that it is not necessary to definitively determine which interpretation of the 2004 language is correct. (see Transcript at 87-96).
[36] HE Report at 8-9.
[37] *Id*.
[38] *Id*. (citing *Salem Hosp. Corp.*, 360 NLRB 95 (April 30, 2014)).
[39] *Id*.
[40] *Id*. at 10.

impartiality, and conduct by employees is essential to assure proper performance of government business and the maintenance of confidence by citizens in their government," and that the "avoidance of misconduct and conflicts of interest on the part of the employees is indispensable to the maintenance of these standards." Lastly, the Hearing Examiner noted that the then version of § 1803.1(a)(6) (now partially § 1800.3(n)) required employees to "avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of affecting adversely the confidence of the public in the integrity of the government."[41]

Applying those regulations to the Policy's provision prohibiting DYRS employees from having outside personal or social media contact with youth who had been under DYRS care, or their families, for three years after the youth leaves DYRS custody, the Hearing Examiner found that "[t]here is nothing [in the District's regulations] which touches directly on the matter of personal contacts between DC Government employees and the people they serve or have served in their official capacity."[42] He further noted that when asked about the provision, Mr. Aqui stated that it was "purely a management policy call."[43]

The Hearing Examiner concluded that the provision therefore "far exceeds the area of proper management concerns expressed in the [DCMR]."[44] He held that DYRS thus "had an obligation to engage in collective bargaining with the Union before burdening the bargaining unit employees represented by Local 383 with the [provision's'] sweeping prohibitions…," and that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it failed to do so.[45]

III. Analysis

The Board will affirm a hearing examiner's findings and recommendations if the findings are reasonable, supported by the record, and consistent with PERB precedent.[46]

A. Direct Dealing

As the Hearing Examiner noted, AFGE Local 383 withdrew its direct dealing allegation at the close of the hearing.[47] Accordingly, that allegation is dismissed with prejudice.

B. Failure to Engage in Good Faith I&E Bargaining

When an agency implements a management rights decision that is protected by D.C. Official Code §§ 1-617.08(a) *et seq*., the agency is not obligated to bargain substantively over the

[41] *Id.*
[42] *Id.*
[43] *Id.* at 10-11.
[44] *Id* at 11-12.
[45] *Id.* at 12.
[46] *Am. Fed'n of Gov't Emp., Local 872 v. D.C. Water and Sewer Auth.*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).
[47] HE Report at 7.

decision, but it still has a duty to, upon a timely request from the union, bargain over the impact and effects of, and procedures concerning the implementation of the decision.[48] That duty does not require the parties to bargain in perpetuity or to reach an ultimate agreement, but the agency must still engage in the negotiations in good faith.[49] The Board has set forth what constitutes "good faith" in the context of I&E bargaining:

> Under Board case law, when I&E bargaining has been requested by the exclusive representative, the agency fulfills its duty to bargain in good faith by going beyond "simply discussing" its proposal with the union, and by doing more than merely requesting the union's input. Furthermore, the agency's participation cannot constitute mere "surface bargaining", and the agency cannot engage in conduct at or away from the table that intentionally frustrates or avoids mutual agreement. Rather, there must be a give and take, with the negotiations entailing full and unabridged opportunities by both parties to advance, exchange, and reject specific proposals.[50]

In this case, the record supports the Hearing Examiner's finding that DYRS' response to AFGE Local 383's request for I&E bargaining over the portions of the Policy protected as management rights "violated the requirements of good faith."[51] For instance, before any bargaining meetings even took place, DYRS' Director, Neil Stanley, made it clear to AFGE Local 383 that although DYRS was "happy" to meet with AFGE Local 383, it was not willing "to do anything other than listen" unless AFGE Local 383 sent its concerns in writing ahead of time.[52] When the parties did meet for the first time to discuss the Policy on September 25, 2012, not a single DYRS management official attended the meeting. Instead, DYRS only sent its attorneys from OLRCB.[53]

Moreover, at the November 16, 2012 meeting, despite the presence of two OLRCB attorneys (who professed to have full authority by themselves to bargain for DYRS),[54] and four DYRS management officials (including its chief operations officer, its chief labor relations liaison, and its in-house legal counsel), DYRS still refused to say whether it had the authority to make any decisions or reach any agreements while at the table.[55] Indeed, Mr. Aqui's own personal notes from the meeting conceded that the "Union walked out because we would not say

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[48] *See AFGE, Local 631, et al. v. D.C. Gov't, et al.*, 62 D.C. Reg. 14666, Slip Op. No. 1541 at p. 5, PERB Case No. 09-U-31; *see also Am Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2401, AFL-CIO v. D.C. Child and Family Serv. Agency*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06 (2014); *and Am. Fed'n of Gov't Emp., Local 631 v. D.C. Pub. Emp. Relations Bd.*, Case No. 2013 CA 005870 P(MPA) (D.C. Super. Ct. Jul. 30, 2015).
[49] *AFSCME, Local 2401, v. D.C. CFSA*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06.
[50] *Id.* (internal citations omitted).
[51] HE Report at 12.
[52] Transcript at 30-31; *see also* DYRS Exceptions at 3.
[53] HE Report at 5-6; *see also* Transcript at 31-39; *and* DYRS Exceptions at 3.
[54] Answer at 8, 15; DYRS Exceptions at 13-15.
[55] HE Report at 7; *see also* Transcript at 43, 141-42.

that we could/would change the policy right here and now."[56] Additionally, it is undisputed that DYRS did not ask to caucus even once to discuss AFGE Local 383's proposals.[57] It is further undisputed that DYRS did not submit a single counteroffer or make any alternative suggestions.[58] True to Mr. Stanley's word, DYRS did literally nothing at the meeting but listen.[59] Accordingly, the record supports the Hearing Examiner's crediting of Mr. Traylor's testimony that DYRS effectively gave AFGE Local 383 the "runaround," which is simply another way of saying that DYRS' conduct constituted bad faith "surface bargaining" as defined in PERB case law.[60]

Therefore, the Board finds that the Hearing Examiner's conclusions that "DYRS' conduct frustrated the Union's efforts to engage in meaningful bargaining regarding the provisions of [the Policy], and their impact and effect on Local 383's bargaining unit, and thereby violated D.C. [Official] Code §§ 1-617.04(a)(1) and (5)" were reasonable, supported by the record, and consistent with PERB precedent.[61]

In its Exceptions, DYRS asserted that the Hearing Examiner erred when he failed to consider its affirmative defense that Mayor's Order 2001-168 conferred unrestricted authority upon OLRCB to bargain collectively on behalf of the Mayor (and thus DYRS) when he found that "DYRS violated the requirements of good faith bargaining on September 25 and November 16 by sending to the bargaining table representatives with *insufficient authority* to engage in meaningful negotiations."[62] The Board rejects the Exception.

The Board notes that the key phrase in the Hearing Examiner's finding was "meaningful negotiations," not "insufficient authority."[63] AFGE Local 383's Complaint alleged that "[b]y unilaterally implementing a policy concerning, in part, subjects within the ambit of managerial rights, *without engaging in good faith impact and effects bargaining* with the Union upon its demand, the Agency has violated D.C. [Official] Code §§ 1-617.04(a)(1)(5)."[64] Accordingly, the question before the Hearing Examiner was not whether OLRCB had the authority to bargain on behalf of DYRS, but whether DYRS satisfied its duty to fully engage in I&E bargaining in good faith.[65] Therefore, DYRS' affirmative defense was irrelevant and the Hearing Examiner did not err when he failed to address it. Indeed, even if OLRCB did have the authority to fully bind DYRS to an agreement at the September 25th meeting, Mr. Aqui testified that OLRCB still

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[56] HE Report at 7; *see also* Transcript at 141-42.
[57] HE Report at 7; *see also* Transcript at 41-45.
[58] *Id.*
[59] *See* Transcript at 30-31.
[60] HE Report at 7; *see also* Transcript at 43; *and AFSCME, Local 2401, v. D.C. CFSA*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06.
[61] HE Report at 12; *see also AFGE., Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.
[62] DYRS Exceptions at 13 (quoting HE Report at 11) (emphasis added by DYRS).
[63] HE Report at 11.
[64] Complaint at 8 (emphasis added).
[65] *See* Slip Op. No. 1449 at 12 (holding that "[a]s issues of fact exist concerning whether DYRS violated the CMPA *by failing to bargain in good faith* with the Union over portions of the employee conduct policy implicating management rights, the matter is best determined after the establishment of a factual record through an unfair labor practice hearing.").

would not have agreed to anything without first consulting with DYRS to make sure that the proposals made sense in terms of DYRS' mission, operations, and needs.[66] If DYRS had simply sent someone with that knowledge to the meeting, it is possible that the negotiations would have been much more effective and efficient, and thus "meaningful."[67] Furthermore, even though there were four DYRS management officials present at the November 17th meeting, DYRS still failed to discuss or deliberate privately over any of AFGE Local 383's proposals.[68] Accordingly, even if OLRCB and DYRS' management officials did have "sufficient authority" to reach an agreement at the meetings (and for the sake of argument, the Board assumes that they did), they still did not do anything to actually exercise that authority in any meaningful way other than to simply show up.[69] Since the Board has determined that DYRS' conduct constituted mere surface bargaining, the Board finds that the Hearing Examiner did not err when he found that "DYRS violated the requirements of good faith bargaining on September 25 and November 16 by sending to the bargaining table representatives with insufficient authority to engage in *meaningful* negotiations," or when he concluded that DYRS therefore "frustrated the Union's efforts to engage in *meaningful* bargaining regarding the provisions of [the Policy]" in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5).[70]

As a remedy, the Board orders DYRS to: 1) cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) by merely engaging in surface bargaining, and thus failing and refusing to engage in good faith I&E bargaining over the portions of the Policy protected as management rights under §§ 1-617.08(a) *et seq.*; 2) engage in good faith I&E bargaining with AFGE Local 383, upon a timely request, over the portions of the Policy protected as management rights under §§ 1-617.08(a) *et seq.*; and 3) post a notice for 30 consecutive days where notices to employees are normally posted detailing DYRS' violation of D.C. Official Code §§ 1-617.04(a)(1) and (5), and asserting that it shall immediately cease and desist from any further related violations.[71]

With regard to AFGE Local 383's request for attorneys' fees, the Board already held in Slip Op. No. 1449 that, in accordance with the constraints of D.C. Official Code § 1-617.13, "no attorneys' fees will be awarded in this case."[72] With respect to AFGE Local 383's request for costs, the Board noted in Slip Op. No. 1449 that, under PERB case law, "any award of costs necessarily assumes that the party to whom the payments is to be made was successful in at least

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[66] Transcript at 134-37, 150-53.
[67] *Id*. at 33-35, 38-39.
[68] *Id*. at 41-45.
[69] It is important to note that the Board is not saying that DYRS was obligated to reach an agreement with AFGE Local 383 right then and there at the table, or even at all. DYRS was obligated, however, to take AFGE Local 383's request for I&E bargaining seriously, and to demonstrate a good faith effort by fully engaging in the process (i.e. discussing and deliberating AFGE Local 383's proposals, offering counter-proposals, and/or reaching tentative agreements if appropriate). *See AFSCME, Local 2401, v. D.C. CFSA*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06. In this case, there is simply no evidence that DYRS did any of that.
[70] HE Report at 11-12 (emphases added); *see also AFSCME, Local 2401, v. D.C. CFSA*, 61 D.C. Reg. 12586, Slip Op. No. 1497 at p. 3, PERB Case No. 10-I-06.
[71] HE Report at 13.
[72] Slip Op. No. 1449 at p. 13.

a significant part of the case…."[73] In this matter, the Board has sustained only three of AFGE Local 383's ten allegations as unfair labor practices. Therefore, since AFGE Local 383 has not prevailed in "a significant part" of its case, no costs will be awarded.[74]

C. Dress Code

The Board rejects the Hearing Examiner's legal conclusion that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented its 2012 dress code without first substantively bargaining with AFGE Local 383.[75] The Hearing Examiner's analysis is contrary to the CMPA and PERB precedent, and his conclusion was not supported by the record.[76]

Under the CMPA, D.C. Official Code § 1-617.08(a)(1) empowers management with the "sole right, in accordance with applicable laws and rules and regulations … [t]o direct employees of the agencies." Further, § 1-617.08(a)(5)(D) empowers management with the sole right "[t]o determine … [t]he agency's internal security practices…."[77] Under the District's regulations, 4 DCMR §§ 513.1-2[78] permit agencies to "prescribe standards of appearance or dress for personnel which serve a reasonable business purpose; for example, …to maintain a neat and clean appearance… [or] to prevent a danger to the health, welfare, or safety of employees or customers…."

In Slip Op. No. 1449, the Board held that an agency does not violate D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing to engage in substantive bargaining with a union over management rights decisions that are in harmony with the DCMR (or other applicable law) because those decisions are protected under the "applicable laws and rules and regulations" clause of D.C. Official Code § 1-617.08(a).[79] However, the Board also held that if the management decision in question goes beyond the scope of the DCMR or other applicable law, then the decision is not "in accordance with applicable laws and rules and regulations" and cannot be imposed without bargaining.[80] Thus, the Board referred AFGE Local 383's allegations regarding DYRS' 2012 dress code to the Hearing Examiner to develop a factual

[73] *Id*. (quoting *Am Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2776 v. D.C. Dep't of Fin. and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at p. 4-5, PERB Case No. 98-U-02 (2000)).
[74] *See AFSCME, Local 2776 v. D.C. DFR*, 73 D.C. Reg. 5658, Slip Op. No. 245 at p. 4-5, PERB Case No. 98-U-02.
[75] HE Report at 11-12.
[76] *See AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.
[77] *See AFGE, Local 631 v. D.C. PERB*, Case No. 2013 CA 005870 P(MPA) (holding that D.C. agencies have the sole non-negotiable right under D.C. Official Code § 1-617.08(a)(5)(D) to determine their internal security practices); *see also Drivers, Chauffeurs & Helpers Local Union No. 639 v. Dist. of Columbia, et. al.*, 631 A.2d 1205, 1215 (D.C. 1993) (holding that D.C. agencies have the right to set their own security policies).
[78] 4 DCMR §§ 513.1-2 falls under Title 4, Chapter 5 of the DCMR, which governs, respectively, "Human Rights and Relations" and "Employment Guidelines." In Slip Op. No. 1449, the Board found that the DCMR was applicable to DYRS under the then version of 6-B DCMR § 1600.1 (now § 1600.2). *See* p. 6.
[79] Slip Op. No. 1449 at 7, 10 (citing *Washington Teachers Union, Local 6 v, D,C, Pub. Sch.*, 46 D.C. Reg. 8090, Slip Op. No. 450 at p. 9, PERB Case No. 95-N-01 (1995); and *Douglas, et al. v. Dixon, et al.*, 39 D.C. Reg. 9621, Slip Op. No. 315 at p. 2, PERB Case No. 92-U-03 (1992)).
[80] Slip Op. No. 1449 at 8-9, 11.

record and determine whether or not its provisions extended beyond the scope of 4 DCMR §§ 513.1-2.[81]

In his Report, the Hearing Examiner made a brief reference to 4 DCMR §§ 513.1-2, but failed to analyze whether or not DYRS' 2012 dress code was within their scope as the Board had instructed.[82] Instead, the Hearing Examiner noted that, under NLRB case law, an employer unlawfully refuses to bargain if it changes the established terms and conditions of employment without first giving notice to and conferring with the statutory bargaining representative of its employees.[83] The Hearing Examiner further noted that under the NLRB's decision in *Salem Hosp. Corp.*, an employer violates the National Labor Relations Act[84] ("NLRA") if it unilaterally adopts a new dress code that "differ[s] materially, substantially, and significantly" from a previous version, such as adding the possibility of discipline.[85] In this case the Hearing Examiner found that because DYRS' 2012 dress code had more specific restrictions and requirements than DYRS' previous dress codes, and because the 2012 dress code was made applicable to all "DYRS staff" regardless of where they worked,[86] and because the 2012 dress code added a new provision that subsequent violations could result in discipline,[87] the Hearing Examiner found that the 2012 dress code differed "materially, substantially, and significantly" from DYRS' previous versions.[88] The Hearing Examiner concluded that DYRS therefore violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented the 2012 changes without first engaging in substantive bargaining with AFGE Local 383.[89]

The Hearing Examiner's analysis was in error. The Board has long held that although it "may often cite NLRB case law, the PERB is not bound by NLRB precedent."[90] This is partly because PERB and the NLRB operate under different statutes. PERB operates under the CMPA, while the NLRB operates under the NLRA. The two statutes are similar in many respects, but differ in one key aspect that is directly relevant to this case; the CMPA has a management rights statute (encapsulated in D.C. Official Code § 1-617.08, *et seq.*), whereas the NLRA does not.[91]

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[81] *Id.* at 8-9.
[82] HE Report at 8-9; *see also Washington Teachers' Union, Local 6, AFL-CIO v. D.C. Pub. Sch.*, 42 D.C. Reg. 3426, Slip Op. No. 329 at p. 3, PERB Case No. 90-U-28 (1992) (holding that the issues in an unfair labor practice proceeding are not determined by the hearing examiner, but by the allegations in the complaint, and, if applicable, by the narrowly-focused issues that the Board has framed in any pre-hearing decisions and orders in the case).
[83] HE Report at 11 (citing *NLRB v. Benne, Katz, etc. d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743, 747 (1962); and *Bedford Farmers Cooperative*, 259 NLRB 1226, 1236 (1982)).
[84] 29 U.S.C. § 151-169.
[85] 360 NLRB 95.
[86] Although, *see* n. 35 herein.
[87] The Board notes that
[88] HE Report at 11-12.
[89] *Id.*
[90] *Bennett, et al v. Int'l Ass'n. of Firefighters, Local 36 and Fire and Emergency Serv. Dep't.*, 47 D.C. Reg. 10092, Slip Op. No. 445 at p. 2, PERB Case No. 95-RD-01 (1995); *see also Fraternal Order of Police/Metropolitan Police Dep't Labor Comm. v. D.C. Metropolitan Police Dep't*, Slip Op. No. 1526 at p. 8, PERB Case Nos. 06-U-23, et al. (June 26, 2015) (holding that while the Board does "sometimes look to NLRB precedent for guidance when relevant, it mostly does so when PERB's case law is silent on a particular issue").
[91] *See Am. Fed'n of Gov't Emp., Local 1000 v. D.C. Dep't of Emp. Serv.*, 60 D.C. Reg. 16455, Slip Op. No. 1434 at p. 4, PERB Case No. 13-U-07 (2013).

Indeed, the Board expressly stated in *AFGE, Local 1000 v. D.C. DOES*, 60 D.C. Reg. 16455, Slip Op. No. 1434 at p. 4, PERB Case No. 13-U-07 that it is not appropriate to consider NLRB precedent in PERB cases that involve an agency's imposition of a dress code "because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights."[92] Accordingly, the Hearing Examiner's reliance on only NLRB case law in his analysis of DYRS' 2012 dress code, and the conclusions he made based on that analysis, were in direct contradiction to the Board's express instructions,[93] and were contrary to the CMPA and PERB precedent.[94]

Furthermore, the record shows that AFGE Local 383 failed to prove, by a preponderance of the evidence, that some or all of the provisions in DYRS' 2012 dress code exceeded the scope of 4 DCMR §§ 513.1-2.[95]

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

In its post-hearing brief, AFGE Local 383 conceded that 4 DCMR §§ 513.1-2 permit agencies to implement dress codes within certain parameters.[96] AFGE Local 383 stated:

> The regulations the Board has referenced [in Slip Op. No. 1449] appear in the chapter [of the DCMR] implementing the District's Human Rights Act ("DCHRA"), D.C. [Official] Code §§ 2-1404.01 *et seq.*, which applies to all employers in the District of Columbia, not just the government. The DCHRA prohibits many forms of employment discrimination including discrimination based on personal appearance. D.C. [Official] Code § 2-1404.11(a). But the regulations contain an exception whereby an employer may impose a non-discriminatory dress code. Thus, the Union agrees that the imposition of a dress code is not a *per se* violation of the DCHRA if its meets the regulatory definition of being nondiscriminatory and for a legitimate work purpose.[97]

The Board agrees with AFGE Local 383 assertion that two possible ways a complainant can prove that an agency's dress code exceeds the scope of the DCMR are to: (1) show that the dress code was unjustifiably discriminatory toward the bargaining unit on one or more of the bases described in the DCHRA;[98] and/or (2) show that the dress code did not serve any of the reasonable business purposes contemplated in 4 DCMR §§ 513.1-2.

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[92] *Id.*
[93] *See WTU, Local 6 v. DCPS*, 42 D.C. Reg. 3426, Slip Op. No. 329 at p. 3, PERB Case No. 90-U-28.
[94] *See AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.
[95] *See WTU, Local 6 v. DCPS*, 42 D.C. Reg. 3426, Slip Op. No. 329 at p. 3, PERB Case No. 90-U-28.
[96] AFGE Local 383 Post-Hearing Brief at 13.
[97] *Id.*
[98] *See* D.C. Official Code § 2-1401.01.

In this case, the record shows that AFGE Local 383 did not assert in its Complaint, at the hearing, or in its post-hearing brief, that the 2012 dress code was in any way discriminatory. If AFGE Local 383 had shown, by testimonial or documentary evidence, that any of the provisions of DYRS' dress code discriminated against a certain class of bargaining unit members in one or more of the manners described in the DCHRA, then under D.C. Official Code § 2-1401.03(a) and 4 DCMR § 513.3, the burden would have shifted to DYRS to prove that the alleged discriminatory provisions served a business necessity.[99] However, AFGE Local 383 did not assert or make any showing that the 2012 dress code was discriminatory in any way toward the bargaining unit. Therefore, in accordance with PERB Rule 520.11, the burden to prove that the dress code exceeded the scope of the DCMR in other ways remained with AFGE Local 383.

The record shows that AFGE Local 383 also did not provide any testimonial or documentary evidence at the hearing or in its post-hearing brief to prove that DYRS' 2012 dress code, in whole or in part, exceeded the scope of the reasonable business purposes contemplated in 4 DCMR §§ 513.1-2.

In its post-hearing brief, AFGE Local 383 argued that just because the regulations permit the District's agencies to implement a dress code, that did not make it a management right.[100] However, AFGE Local 383 did not provide any case law or other applicable evidence in its brief to support that assertion. Even if it had, the Board already determined in Slip Op. No. 1449 that the implementation of a dress code will be protected as a management right under the CMPA if its provisions are within the scope of the DCMR.[101]

AFGE Local 383 further argued in its post-hearing brief that "there was no detailed dress code in place at DYRS that applied to all members of the bargaining unit prior to the issuance of the 2012 employee conduct policy," and that under NLRB case law "the imposition of a new or materially changed dress code is a mandatory subject of bargaining."[102] As already discussed, *supra*, the Board has determined that it is not appropriate to consider precedent from the NLRB

[99] The Board notes that when an asserting party demonstrates that a dress code is discriminatory under the DCHRA, 4 DCMR § 513.3 states that the agency must merely "show" that the alleged discriminatory provision serves a "reasonable business purpose" in order to survive scrutiny. However, D.C. Official Code § 2-1401.03(a) goes further and states that the respondent must "prove" that the discriminatory provision is justified by "business necessity." In other words, the respondent must prove, under the specific facts of that individual case, that its business cannot be conducted without the discriminatory provision. The statute further provides that "a 'business necessity' exception cannot be justified by the facts of increased costs to business, business efficiency, the comparative characteristics of one group as opposed to another, the stereotyped characterization of one group as opposed to another, and the preferences of co-workers, employers, customers or any other person." Since statutes control over regulations, it is the statutory language that governs what respondents must prove if the burden shifts to them upon a showing by the complainant that a dress code is discriminatory. In this case, however, AFGE Local 383 did not assert or show that DYRS' 2012 dress code was in any way discriminatory, so the burden of proof did not shift to DYRS.
[100] AFGE Local 383 Post-Hearing Brief at 13.
[101] Slip Op. No. 1449 at 8-9.
[102] AFGE Local 383 Post-Hearing Brief at 14.

in PERB cases involving an agency's imposition of a dress code "because the National Labor Relations Act has no parallel to the CMPA's statutory grant of management rights."[103]

AFGE Local 383 also argued that the Federal Labor Relations Authority ("FLRA") "has found in some instances that imposition of a dress code is a mandatory subject of bargaining."[104] Although the Federal Service Labor-Management Relations Statute ("Federal Service Statute")[105] has a management rights provision similar to that of the CMPA,[106] and even though the FLRA has found that dress codes under that statute generally constitute a mandatory subject of bargaining,[107] the Board finds that it is not necessary to look to those sources for guidance in this case because PERB already has an established precedent on whether dress codes constitute a mandatory subject of bargaining under the CMPA.[108] As discussed, *supra*, in Slip Op. No. 1449, the Board determined that since 4 DCMR §§ 513.1-2 expressly permit the District's agencies to implement a dress code, then the adoption of a dress code is a protected management right under the CMPA as long as the dress code's provisions do not exceed the scope of the DCMR.[109] The vital distinction between the Federal Service Statute and the CMPA is that the federal government does not have a universally applicable regulation comparable to 4 DCMR §§ 513.1-2 that permits its agencies to implement a dress code. Rather, that decision is left to each federal agency to determine for itself. Accordingly, although dress codes may constitute a mandatory subject of bargaining in cases before the FLRA, they do not constitute a mandatory subject of bargaining in cases before PERB unless it is first shown that the dress code exceeds the scope of the DCMR.[110]

Next, AFGE Local 383 contended in its post-hearing brief that since Mr. Traylor testified at the hearing that only "eight to ten" of the bargaining unit's approximately 60 members worked in secure facilities," then "there is no justification whatsoever for imposing a safety related dress code on the 50 or so other members of the bargaining unit."[111] Notwithstanding Mr. Traylor's testimony,[112] even if most of the bargaining unit members did not work in the secure facilities full time, there is nothing in the record to show that they never had to go into the secure facilities in the regular course of their duties. If they did, then the universal application of the dress code may have been justified. Accordingly, without any additional evidence, the Board cannot conclude that there was "no justification" for DYRS to impose a safety related dress code on the entire bargaining unit, as AFGE Local 383 contended.

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[103] *See AFGE, Local 1000 v. D.C. DOES*, 60 D.C. Reg. 16455, Slip Op. No. 1434 at p. 4, PERB Case No. 13-U-07.
[104] AFGE Local 383 Post-Hearing Brief at 15-16 (internal citations omitted).
[105] 5 U.S.C. §§ 7101-7135.
[106] *Id.* at § 7106.
[107] *See, e.g., Dep't of Homeland Security and Nat'l Treasury Emp. Union*, 62 FLRA 236 (2007) (holding that generally, employee attire is a condition of employment and, therefore, negotiable as to substance).
[108] *See Am. Fed'n of Gov't Emp., Local 2741 v. D.C. Dep't of Parks and Recreation*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 8, PERB Case No. 00-U-22 (2002) (holding that PERB looks to other the decisions of other labor relations authorities only when its own precedent is silent on the issue in question).
[109] Slip Op. No. 1449 at 8-9.
[110] *See* Slip Op. No. 1449 at 8-9.
[111] AFGE Local 383 Post-Hearing Brief at 16.
[112] *See* Transcript at 25-26, 160.

Lastly, AFGE Local 383 argued in its post-hearing brief that "to the extent [DYRS' dress code] aims to make employees appear 'professional' and prohibits the wearing of athletic attire, DYRS failed to articulate how these restrictions somehow promote safety."[113] As already discussed, *supra*, since AFGE Local 383 made no showing that some or all of DYRS' 2012 dress code was in any way discriminatory, DYRS did not have the burden of proof in this case. Rather, the burden was on AFGE Local 383, as the party asserting that DYRS committed an unfair labor practice by failing to bargain substantively over the dress code prior to implementing it, to prove that the 2012 dress code exceeded the DCMR and was therefore a mandatory subject of bargaining.[114] The record shows, however, that AFGE Local 383 did not provide any documentary or testimonial evidence to meet that burden. Indeed, Ms. Hall gave unrebutted testimony at the hearing that whenever she went into a secure area, she had to first change certain items of her attire such as her shoes and earrings "for safety reasons."[115] Furthermore, the Hearing Examiner found in his Report, based on Ms. Hall's testimony, that "DYRS adopted the [2012 dress code] because of safety or security incidents."[116] Specifically, Ms. Hall testified that:

> The creation of the 2012 [dress code] was built upon the current policy that the Agency had in place. They did make some changes to the policy and they added some additional items, which we referenced in… the piece in regard to piercings and things of that nature. And a lot of that was done based on incidents that had happened on the facility, which promoted them to add some additional coverages in there.[117]

The Board concedes that Ms. Hall's uses of the phrases "some" and "a lot" do seem to cast some doubt on whether safety and security were the only reasons DYRS made the changes.[118] However, AFGE Local 383 did not elicit any additional testimony, either from Ms. Hall or its own witnesses, to flesh out which, if any, of the 2012 changes were based on security reasons and which ones were not. Additionally, AFGE Local 383 did not follow up on Ms. Hall's statement about the "incidents that had happened on the facility" to determine what exactly happened in those incidents; or to establish whether the 2012 changes were or were not reasonably related to them.

Indeed, if safety and security were DYRS' only purposes for making the 2012 changes, then its 2012 dress code would likely have fallen within the expressly stated scope of 4 DCMR § 513.2, which permits agencies to "prescribe standards of dress for personnel in order to prevent a danger to the health, welfare, or safety of employees or customers," and D.C. Official Code § 1-617.08(a)(5)(D), which empowers management with the sole right "[t]o determine … [t]he

[113] AFGE Local 383 Post-Hearing Brief at 16.
[114] *See* PERB Rule 520.11; s*ee also WTU, Local 6 v. DCPS*, 42 D.C. Reg. 3426, Slip Op. No. 329 at p. 3, PERB Case No. 90-U-28.
[115] Transcript at 77, 98-99.
[116] HE Report at 9.
[117] Transcript at 87.
[118] *See also, e.g., id.* at 99.

agency's internal security practices…."[119] It is also possible that even if the changes were not solely based on safety and security reasons, then they still would have fallen within the scope of 4 DCMR § 513.1 if they served the "reasonable business purposes" of identifying DYRS' employees to the public "by means of a distinctive uniform, or to maintain a neat and clean appearance." If AFGE Local 383 had called any witnesses or provided any documentary evidence to show that the 2012 changes did not serve any of those purposes, and/or to show that the dress code's provisions were not tailored to accomplish those purposes, then the Board may have been able to find that the 2012 changes were outside the scope of the DCMR, and that DYRS committed an unfair labor practice when it implemented the changes without first substantively bargaining with AFGE Local 383. But as the record sits, there is not enough evidence for the Board to reasonably make any of those conclusions.

Accordingly, the Board finds that the record does not support the Hearing Examiner's conclusion that "DYRS' refusal to bargain with Local 383, and its unilateral implementation of the 2012 dress code … violated D.C. [Official] Code §§ 1-617.04(a)(1) and (5)."[120] Additionally, the Board finds that AFGE Local 383 did not meet its burden, under PERB Rule 520.11, to prove by a preponderance of the evidence that DYRS had a duty to bargain substantively over the dress code portion of the Policy, or that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it failed to engage in substantive bargaining with AFGE Local 383 prior to the dress code's implementation.[121] Accordingly, AFGE Local 383's allegation is dismissed with prejudice.

D. Prohibition of Outside Contact With Youth After Release from DYRS Custody

The Board rejects the Hearing Examiner's finding that the Policy's provision prohibiting DYRS employees from having outside personal or social media contact with youth who had been in DYRS custody, or their families, for three years after the youth leaves DYRS custody "far exceeds the area of proper management concerns" expressed in the then versions of 6-B DCMR §§ 1800.1-2, and § 1803.1(a)(6) (now partially § 1800.2 and § 1800.3(n), respectively).[122] The Board further rejects the Hearing Examiner's conclusion that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented the provision without first

[119] *See AFGE, Local 631 v. D.C. PERB*, Case No. 2013 CA 005870 P(MPA).
[120] HE Report at 12.
[121] The Board notes that this decision should not be interpreted to mean that DYRS' 2012 dress code was within the scope of the DCMR, or that it was protected as a management right. Indeed, there are certain parts of DYRS' dress code that give the Board great concern. However, AFGE Local 383 did not raise any specific allegations or concerns about any of the dress code's particular requirements other than to question its prohibition against athletic attire, and even then AFGE Local 383 failed to provide any documentary or testimonial evidence to establish that that provision exceeded the scope of the DCMR. Accordingly, the Board was bound to make its decision based on the record that was before it, not the record it wished it had. *See* PERB Rule 520.14. Had additional arguments been made, or had additional facts been established by either party, then it is possible, and perhaps even likely, that the outcome in this matter would have been different.
[122] HE Report at 10-12.

substantively bargaining with AFGE Local 383.[123] The Hearing Examiner's findings are not supported by the record.[124]

PERB Rule 520.11 states that "[t]he party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Additionally, when an alleging party has failed to introduce documentary evidence, establish testimony, or make arguments supporting an allegation at a hearing other than to briefly mention the assertion in its opening statement and/or in its post-hearing brief, the allegation may be deemed "abandoned and waived."[125]

In this case, the Board's review of the transcript confirms DYRS' contention in its Exceptions that AFGE Local 383's only reference to its allegation regarding DYRS' no-contact provision at the hearing was in its opening statement.[126] Further, the only arguments AFGE Local 383 made in its post-hearing brief were that the then versions of 6-B DCMR §§ 1800.1-2, and § 1803.1(a)(6) were later amended and no longer contained the operative language that DYRS relied upon in its Answer, and that the prohibition was "a restriction on employees' lives and conduct."[127] The Hearing Examiner correctly ignored AFGE Local 383's irrelevant argument about the DCMR sections being subsequently amended in 2014 because the question before him was whether the Policy's no-contact provision was within the scope of the DCMR at the time the Policy was implemented in 2012.[128] Furthermore, even though DYRS' no-contact provision undoubtedly imposed a restriction on its employees' lives and conduct (as all regulations and policies do), AFGE Local 383 offered absolutely no testimony or other evidence to prove, by a preponderance of the evidence, that those restrictions were unreasonable or outside of the scope of the DCMR.

In its Opposition to DYRS' Exceptions, AFGE Local 383 asserted that "the policy itself is the evidence that supports the Hearing Examiner's conclusion that it is broader than the language set forth in [6-B DCMR §§ 1800.1-2, and § 1803.1(a)(6)]."[129] AFGE Local 383 noted that the text of DYRS' no-contact provision was entered into evidence as Joint Exhibit 1, and that the DCMR sections in question are "part of the public domain and are therefore not required to be submitted as an exhibit."[130] AFGE Local 383 argued that "[t]hese two sources of policy are the only relevant facts to determine the relative scope," and that "[a]ny witness testimony would have been in the nature of a legal opinion about the meaning of the policies and would, therefore, have been inappropriate."[131] AFGE Local 383 contended that the Hearing Examiner

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[123] *Id*. at 12.
[124] *See* PERB Rule 520.14; *see also AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.
[125] *Am Fed'n of State, Cnty., and Mun. Emp., Dist. Council 20, Local 2401, AFL-CIO v. D.C. Child and Family Serv. Agency*, 61 D.C. Reg. 5608, Slip Op. No. 1463 at p. 7, 14, PERB Case No. 10-U-37 (2014).
[126] *See* Transcript at 10.
[127] AFGE Local 383 Post-Hearing Brief at 17-18.
[128] Slip Op. No. 1449 at 11.
[129] AFGE Local 383 Opposition to Exceptions at 5.
[130] *Id*.
[131] *Id*.

did "what he had been tasked to do" when he "reviewed the provisions in the regulations and of the DYRS policy at issue and concluded that the DYRS policy is broader than the ethics regulations."[132] AFGE Local 383 argued that, therefore, "DYRS simply disagrees with the Hearing Examiner's legal conclusion as to the meaning and scope of [the regulations]."[133]

The Board rejects AFGE Local 383's arguments. In Slip Op. No. 1449, the Board noted that it already had before it the texts of DYRS' no-contact provision and the regulations, but determined that those two sources alone did not prove AFGE Local 383's allegations by a preponderance of the evidence. Indeed, the Board merely stated that the Policy's no-contact provision "*may* extend beyond the scope of the DCMR," but concluded that additional facts were needed to know for sure.[134] Thus, the Board found that the "question [would be] best determined by a hearing examiner" who would "develop a full and factual record upon which the Board may make a decision."[135]

It then behooved AFGE Local 383, as the party asserting the violation, to call witnesses at the hearing and/or to present additional documentary evidence before the Hearing Examiner to prove by a preponderance of the evidence that the Policy's no-contact provision went beyond the scope of the then DCMR's requirements.[136] Indeed, AFGE Local 383 could have called witnesses who were integral in the drafting of the provision to testify why it was added to the Policy, what purpose it was meant to achieve, and how that purpose related to the DCMR's employee conduct requirements. It could have called witnesses from the bargaining unit to establish and support its claim that the provision was overly restrictive. However, AFGE Local 383 did none of that. Accordingly, the Board finds that AFGE Local 383 effectively waived and abandoned its allegation.[137]

Thus, the Board finds that there is not enough evidence in the record to support the Hearing Examiner's conclusion that DYRS' no-contact provision "far exceeds" the scope of 6-B DCMR §§ 1800.1-2, and § 1803.1(a)(6).[138] Furthermore, the Board finds that there is not enough evidence support the Hearing Examiner's conclusion that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) when it unilaterally implemented the provision without first substantively bargaining with AFGE Local 383.[139]

Therefore, AFGE Local 383's allegation regarding DYRS' no-contact provision is dismissed with prejudice.

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[132] *Id*.
[133] *Id*.
[134] Slip Op. No. 1449 at 11 (emphasis added).
[135] *Id*.; PERB Rule 520.11.
[136] PERB Rule 520.11; *see also* 2012 versions of 6-B DCMR §§ 1800.1-2, and § 1803.1(a)(6).
[137] *See AFCSME, Dist. Council 20, Local 2401, v. D.C. CFSA*, 61 D.C. Reg. 5608, Slip Op. No. 1463 at p. 7, 14, PERB Case No. 10-U-37.
[138] *See* PERB Rule 520.14; *see also AFGE Local 872 v. D.C. WASA*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12.
[139] *See* Slip Op. No. 1449 at 7, 10.

IV. Conclusion

Based on the foregoing, the Board finds that DYRS failed to engage in good faith I&E bargaining over the portions of the Policy protected as management rights under D.C. Official Code §§ 1-617.08(a) *et seq*., and therefore violated D.C. Official Code §§ 1-617.04(a)(1) and (5). Accordingly, the Board will order DYRS to: 1) cease violating the CMPA as alleged; 2) engage in good faith I&E bargaining with AFGE Local 383, over portions of the Policy protected as management rights; and 3) post a notice detailing its violations of the CMPA. Furthermore, AFGE Local 383's direct dealing allegation, as well as its allegations related to the dress code and no-contact portions of the Policy, are dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. DYRS, its agents, and representatives shall cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) by failing and refusing to bargain in good faith with AFGE Local 383 over the impact or effects of, and procedures concerning the implementation of the portions of the Policy protected as management rights under §§ 1-617.08(a) *et seq.*;

2. DYRS shall engage in good faith bargaining with AFGE Local 383, upon a timely request, over the impact or effects of, and procedures concerning the implementation of the portions of the Policy protected as management rights under §§ 1-617.08(a) *et seq*.;

3. DYRS shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days;

4. AFGE Local 383's requests for attorneys' fees and costs are denied;

5. AFGE Local 383's direct dealing allegation, as well as its allegations related to the dress code and no-contact provisions of the Policy, are dismissed with prejudice; and

6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, and Members Yvonne Dixon, Ann Hoffman, Barbara Somson, and Douglas Warshof.

April 21, 2016
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-06, Op. No. 1577 was sent by File and ServeXpress to the following parties on this the 9th day of June, 2016.

Brenda C. Zwack
Murphy Anderson, PLLC
1300 L Street, NW,
Suite 1200
Washington, DC 20005

Kevin M. Stokes, Esq.
Michael D. Levy, Esq.
D.C. Office of Labor Relations
and Collective Bargaining
441 4th Street, NW,
Suite 820 North
Washington, DC 20001

/s/ Sheryl Harrington
PERB

Public Employee Relations Board

GOVERNMENT OF
THE DISTRICT OF COLUMBIA

1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1577, PERB CASE NO. 13-U-06, (JUNE 9, 2016).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law in the manners alleged in PERB Case No. 13-U-06, and has ordered DYRS to post this Notice.

WE WILL cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manners stated in Slip Opinion No. 1577, PERB Case No. 13-U-06.

WE WILL cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing or failing to bargain in good faith with AFGE Local 383, upon request, over the impact or effects of, and procedures concerning the implementation of management decisions made pursuant to D.C. Official Code §§ 1-617.08(a) *et seq*.

Department of Youth Rehabilitation Services

Date:_____ By:_____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or DYRS' compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

June 9, 2016

Washington, D.C.