Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, Local 1403	)	PERB Case No. 18-U-02
Petitioner	)	
	)	Opinion No. 1709
v.	)	
The District of Columbia Department of Health	)	
Respondent	)	

DECISION AND ORDER

I. Introduction

On October 16, 2017, the American Federation of Government Employees, Local 1403 ("AFGE") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Department of Health ("DOH"). AFGE alleges that DOH committed an unfair labor practice by changing the performance evaluation system, with the introduction of the New Performance Review Calibration Process, without notice or an opportunity to bargain the impact and effects of the change. DOH filed an Answer on October 30, 2017, denying that it committed an unfair labor practice and requesting dismissal of the Complaint.

PERB ordered a hearing that occurred on November 28, 2018. The Hearing Examiner issued his Report and Recommendation ("Report") on January 22, 2019. The Report concluded that DOH committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and § 1-617.04(a)(5) by unilaterally implementing the New Performance Calibration Review Process. DOH filed exceptions to the Report. The record is complete and before the Board.

The Board dismisses the Complaint, for the reasons herein.

II. Hearing Examiner's Report and Recommendation

AFGE is the exclusive representative for fourteen line attorneys employed at DOH.[1] AFGE alleges violations of the 2014 and 2017 working conditions agreements ("working conditions agreements") and the 2014 and 2017 compensation agreements ("compensation agreements"). [2]

Article 28 Section 2 of the working conditions agreements creates an appeal process for the performance ratings of line attorneys. [3] This section permits the Attorney General to appoint a three-person committee to review performance ratings, conduct hearings, receive written briefs, and issue a written decision which shall approve, modify, or reject a performance rating. [4] The decision of the committee is appealable to the Attorney General for a final decision. [5] The working conditions agreements incorporate the compensation agreements by reference.

The compensation agreements include a bonus protocol based on performance rating definitions found in the District Personnel Manual ("DPM").[6] Under the 2014 compensation agreement, an attorney rated as "exceeds expectations" or substantially similar would receive a 2% salary bonus. The 2017 compensation agreement provides a 1.5% salary bonus for an attorney rated "excellent" or substantially similar and a 2% salary bonus for an attorney rated "outstanding" or substantially similar.[7] The definitions of "excellent" and "outstanding" are in DPM.[8]

On October 14, 2016, DOH issued a memorandum to its employees announcing a "New Performance Review Calibration Process."[9] There is no evidence that the New Performance Review Calibration Process was subject to negotiations.[10] The memorandum made no reference to the working conditions agreements or the compensation agreements.[11] The memorandum accounted for neither the performance review procedure nor the definitions applicable to line attorneys under the DPM.[12] The Performance Review Calibration Process ranked employees on a scale. The scale and the rankings differed from the DPM. [13]

On October 13, 2017, DOH issued a memorandum which reiterated the earlier provisions of the Performance Review Calibration Process.[14] AFGE sought arbitration at the Federal

[1] Report at 1.
[2] Report at 1.
[3] Report at 1.
[4] Report at 2.
[5] Report at 2.
[6] Title 6B DCMR.
[7] Report at 2.
[8] Report at 3.
[9] Report at 3.
[10] Report at 3.
[11] Report at 4.
[12] Report at 3.
[13] Report at 11.
[14] Report at 11.

Mediation and Conciliation Service ("FMCS"). DOH objected to the arbitration request and the FMCS refused to conduct an arbitration in the matter. [15]

The Hearing Examiner determined that the central issue was whether an agency's unilateral modification of a material provision of a collective bargaining agreement constitutes an unfair labor practice.[16] The Hearing Examiner found that the Performance Review Calibration Process materially changed the substance and process of performance evaluation for line attorneys; altering the terms of the compensation agreements.[17] The Hearing Examiner questioned whether an agency, after entering into a binding collective bargaining agreement, may unilaterally alter the term of an agreement while the agreement remains in full force and effect.[18] The Hearing Examiner determined that it would be against public policy and the CMPA to permit such action.[19]

DOH argued that the agency had an absolute management right to implement a performance management system for its employees, including the fourteen line attorneys.[20] The Hearing Examiner found that argument unpersuasive because performance ratings were subject to collective bargaining and resulted in specific language in the working conditions agreements.[21] Also, the Hearing Examiner found that the compensation agreements incorporated provisions of the working conditions agreements into the sections applicable to bonuses and wages.[22] The Hearing Examiner found that PERB precedent makes the attorneys' performance management system a negotiable subject of bargaining.[23]

The Hearing Examiner recommended the following:

> "1. The Performance Review Calibration Process implemented by the Department of Health in memoranda of October 14, 2016 and October 13, 2017, should be discontinued as to all line attorneys employed by the Department.
>
> 2. Within 30 days of service of a Final Order of PERB in this matter, the DC Department of Health shall implement a performance review evaluation process for all Department line attorneys, which process shall be consistent with the provisions

[15] Report at 3.
[16] The Hearing Examiner also addressed the question of timeliness. DOH argued that the filing of the Complaint was untimely. Under PERB Rule 520.4 parties must file an unfair labor practice complaint within 120-days of the alleged violation. The Complaint was filed on October 16, 2017, DOH argued that AFGE had notice of the alleged violation when the first memorandum was issued on October 14, 2016. The Hearing Examiner found that the performance management system implemented by the DOH memoranda of October 14, 2016, and October 13, 2017, continued into the present day. The Hearing Examiner found that AFGE filed a timely Complaint on October 16, 2017, because it did not have notice that the performance management system applied to attorneys until October 13, 2017.
[17] Report at 10.
[18] Report at 14.
[19] Report at 14.
[20] Report at 14.
[21] Report at 14.
[22] Report at 15.
[23] Report at 15.

of District Personnel Manual, Chapter 36, and specifically Sections 3605.1 through 3605.19 and the definitions section of Chapter 36 appearing at Section 3699.1.

3. The bonus provisions set forth in the Compensation Agreements effective October 1, 2013 through September 30, 2020 are applicable to evaluation of DOH line attorneys and should be implemented within 30 days of service of Final Order of PERB.

4. All DOH line attorneys are entitled to reopening and reevaluation of their performance for the years 2016, 2017, and 2018. Each such evaluation shall be undertaken consistent with Chapter 36 of the District Personnel Manual and the provisions of the applicable Collective Bargaining Working Conditions Agreements and applicable Compensation Agreements.

5. If the reopening and reevaluation of a line attorney results in a revised rating justifying the award of a bonus under the applicable Compensation Agreement, then, and in that event, the appropriate bonus shall be paid to each qualifying line attorney within 30 days of service of Final Order of PERB in this matter.

6. The D.C. Department of Health shall comply with all provisions of the Collective Bargaining Working Conditions Agreement and the Compensation Agreement with AFGE Local 1403 presently in full force and effect.

7. The D.C. Department of Health shall notify Counsel to AFGE, Local 1403 of compliance with all provisions of Final Order of PERB in this matter." [24]

III. DOH Exceptions to Hearing Examiner Report and Recommendation

On February 22, 2019, DOH filed exceptions to the Report. First, DOH argues that the Hearing Examiner should be overruled because AFGE failed to prove an unfair labor practice as alleged in the Complaint. The Complaint asserts that DOH unilaterally implemented an evaluation system without notice or the opportunity to bargain the impact and effects of the change. DOH asserts that AFGE did not present any evidence to support its position and failed to produce evidence that the union requested the opportunity to bargain.[25]

Next, DOH argues that the Hearing Examiner improperly analyzed the working conditions agreements, the compensation agreements, and the DPM to determine that a statutory violation occurred. DOH argues that the Hearing Examiner failed to defer to the parties' grievance procedure and instead chose to find a statutory violation.[26]

[24] Report at 21-22.
[25] Exceptions at 4.
[26] Exceptions at 7.

Finally, DOH filed exceptions to the relief offered by the Hearing Examiner. DOH argues that the *status quo ante* relief provided by the Hearing Examiner is generally inappropriate once a performance evaluation is implemented. Moreover, DOH argues that the Board has generally ruled that once a performance evaluation system is in effect the Board will not stop an employer from operating the system.[27]

AFGE did not file an Opposition to DOH's Exceptions.

IV. Analysis

The Board rejects the Report and Recommendation of the hearing examiner as unreasonable, unsupported by the record, and inconsistent with PERB precedent.[28]

A. Performance Review Calibration Process

The performance review calibration process is a method to review the supervisor's rating to ensure consistency among raters.[29]

The performance review calibration process occurs after the supervisor determines a proposed evaluation rating.[30] Under the calibration guidelines, if the rating is a "4" or "5" the supervisor presents the proposed evaluation to the calibration committee for review.[31] The calibration committee is made up of DOH managers and senior staff.[32] After the evaluation is reviewed by the calibration committee, the supervisor presents the proposed evaluation to the Director of the Mayor's Office of Legal Counsel (MOLC) for final approval. The MOLC determines the final rating of an attorney.[33]

The performance review calibration process is designed to ensure employees are evaluated on objective criteria.[34] This process also has a goal of providing supervisors with an opportunity to learn how they can increase their ability to observe, document, and objectively evaluate performance.[35] The committee does not have the authority to change or draft any employee evaluations.[36]

---

[27] Resp. Exceptions at 8.
[28] *See Washington Teachers' Union v. DCPS,* 65 D.C. Reg.7474, Slip Op. 1668 at 5, PERB Case No. 15-U-28 (2018).
[29] Comp. Ex. C1 at 1-4.
[30] Comp. Ex. C1 at 1.
[31] Comp. Ex. C1 at 1.
[32] Comp. Ex. C1 at 1.
[33] Tr. at 104.
[34] Comp. Ex. C1 at 1.
[35] Comp. Ex. C1 at 1.
[36] Tr. at 101-102.

The performance review calibration process is consistent with the DPM.[37] The DPM expresses an intention to rely on advisory recommendations from outside the legal chain of command prior to the finalization of evaluations, and it plainly authorizes the MOLC to consult with any person who prepared an advisory evaluation under 6B DCMR §3605.5.[38]

The finding that the performance review calibration process materially changed the substance of performance evaluation for line attorneys is unsupported by the record.

In this case, the compensation agreements and the working conditions agreements neither contain a process for performance evaluation nor incorporate the procedures of the DPM by reference.[39] The final evaluations of employees are consistent with the definitions required under 6B DCMR § 3699.[40] The calibration process is advisory; the supervisor and the MOLC maintain the sole discretion to finalize the evaluation of employees.[41] Also, if an employee disagreed with the final evaluation rating the employee maintained the right to appeal under 6B DCMR §3605.8.[42] DOH was not precluded from implementing the performance calibration review process as an element within the performance evaluation system, adoption of which is a management right.[43]

B. Negotiability of Performance Evaluation System

The Hearing Examiner erroneously relied on the first holding in *Local 1403 v. D.C. Office of the Corporation Counsel*[44] to find that the performance management system applicable to attorneys under the Legal Services Establishment Act ("LSEA")[45] is a negotiable subject of bargaining.[46] *Local 1403 v. D.C. Office of Corporation Counsel* contains two separate holdings regarding the negotiability of performance management systems. The first holding deals with legality of bargaining over performance management systems, and the second holding deals with the implementation of performance management systems.

In *Local 1403 v. D.C. Office of Corporation Counsel*, the Board decided whether the topic of performance management was an illegal subject of bargaining.[47] The Office of Corporation Counsel argued that negotiation of a performance management system was an illegal subject of

---

[37] 6B DCMR §3605.
[38] 6B DCMR § 3605.5 "As soon as practicable after the receipt of the evaluations, the Attorney General, the Director, or the agency head shall complete his or her review. In reviewing evaluations of line attorneys, the Attorney General, the Director, or the agency heard may consult with the supervisor who prepared the evaluation, any person who prepared an advisory evaluation, and the supervisors in the chain of command for the relevant unit."
[39] See Joint Ex. 1 at 33; Joint Ex. 2 at 4; Joint Ex. 3 at 4; Joint Ex. 4 at 33.
[40] Tr. at 63. AFGE witness testified that her final evaluation was marked "successful".
[41] Comp. Ex. C1 at 1. "Once the respective reviewer concurrence is received, the supervisor will meet with the employee to complete the face-to-face feedback session.
[42] 6B DCMR § 3605.8 "If a line attorney disagrees with the written evaluation, he or she may appeal it within thirty (30) days of receipt to the appropriate review committee established by the Attorney General or the Director."
[43] D.C Official Code § 1-617.08(a).
[44] Slip Op. No. 709 at 3, PERB Case No. 03-N-02 (2003).
[45] D.C. Official Code §1-608.57
[46] Report at 16-15.
[47] Slip Op. No. 709 at 3, PERB Case No. 03-N-02 (2003).

bargaining under section 1-613.52 of the CMPA.[48] The union argued that section 1-613.52 of the CMPA did not apply to attorneys because the LSEA provided a separate authority to establish a performance management system.[49] The Board agreed with the union, holding that because the LSEA contains "no language which prohibits negotiating over of a performance management system", it is negotiable.[50] In its second holding, the Board addressed the question of whether a provision that establishes the purpose, objectives, and standards of a performance management system is negotiable.[51] The Board held that "management's right to evaluate employee performance is an exclusive one" under the CMPA.[52] In *Comp Unit 31 v. WASA*,[53] the Board expanded on this holding from *Local 1403 v. D.C. Office of the Corporation Counsel*.

In *Comp Unit 31 v. WASA*, Comp Unit 31 proposed new descriptions of bonus levels that would link performance ratings and bonuses. The Board found that the new language constituted an attempt to establish criteria for conducting performance evaluations.[54] The Board held that a proposal that contains criteria for the agency to consider for performance evaluations is nonnegotiable under D.C. Code § 1-617.08(a) because it interferes with management's right to direct and assign employees. [55] The Board made it clear that "it is within management's exclusive rights to implement a performance evaluation system."[56]

Comp Unit 31 argued that because WASA had independent statutory authority to establish a personnel evaluation system the CMPA did not apply and therefore the proposal was negotiable. The Board found that Comp Unit 31's argument was "irrelevant" because, under PERB's case law, the right to evaluate personnel is bestowed by the management's rights clause found in D.C. Official Code § 1-617.08(a).[57]

Likewise, in this case, DOH had the exclusive right to implement the Performance Review Calibration Process. This decision was nonnegotiable under D.C. Official Code § 1-617.08(a)(1), management's right to direct and assign employees.[58]

---

[48] *Local 1403 v. D.C. Off. of the Corp. Counsel*, Slip Op. No. 709 at 3, PERB Case No. 03-N-02
[49] *Id.*
[50] *Id.* at 3.
[51] *Id.* at 5-6.
[52] *Id*. at 6. Citing *Patent Office Professional Association and U.S. Department of Patent and Trademark*, 48 FLRA 129, 142 (1993).
[53] Slip Op. 1624 at 5, PERB Case 16-N-02 (2017).
[54] *Comp Unit 31 v. WASA*, 64. D.C. Reg. 9287, Slip Op. 1624 at 6, PERB Case 16-N-02 (2017).
[55] *Id*.
[56] *Comp Unit 31 v. WASA*, 64. D.C. Reg. 9287, Slip Op. 1624 at 5, PERB Case 16-N-02 (2017). *See, Serv. Emp. Int'l Union, Local 500*, v. *Univ. of D.C.*, Slip Op. No. 1539 at 12-14, PERB Case No. 15-N-01(2015); *AFGE Local 1403 v. D.C. Office of the Corp. Counsel*, Slip Op. No. 709 at 6, PERB Case No. 03-N-02 (2003).
[57] *Id.*
[58] *Id*.

C. Impact and Effects Bargaining

In its Complaint AFGE alleges that DOH committed an unfair labor practice by implementing a change in the performance evaluation system without providing notice or affording an opportunity to engage in impact and effects bargaining.[59] Notwithstanding the non-negotiability of a management right, management has a duty to negotiate the impact and effects of its decision, upon request by the union.[60] "Absent a request to bargain concerning the impact and effects of the exercise of a management right, an employer does not violate D.C. Code § l-617.04(a)(l) and (5) by unilaterally implementing a management right under the CMPA."[61]

The Hearing Examiner failed to discuss whether the AFGE requested impact and effects bargaining. AFGE had the burden to show that it requested bargaining and that DOH committed an unfair labor practice by refusing to negotiate.[62] There is no evidence in the record that AFGE requested bargaining. Moreover, AFGE's witness provided testimony that it failed to request impact and effects bargaining.[63]

Thus, the finding that DOH committed an unfair labor practice is inconsistent with PERB precedent.

V. Conclusion

Based on the foregoing, the Board finds that AFGE failed to carry its burden of proof to demonstrate that the unilateral change of the evaluation system constituted an unfair labor practice. The Hearing Examiner's Report and Recommendation is inconsistent with PERB precedent. Accordingly, the Hearing Examiner's Report and Recommendation is rejected, and AFGE's Complaint is dismissed with prejudice.

---

[59] Complaint at 2.
[60] *See AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. 1514 at 4, PERB Case No. 14-U-03 (2015).
[61] *Id.*
[62] PERB Rule 520.11.
[63] Tr. at 72.

ORDER

IT IS HEREBY ORDERED THAT:

1. The unfair labor practice complaint is hereby denied.

2. Pursuant to Board Rule 559, 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 Board Members Mary Anne Gibbons, Ann Hoffman, Barbara Somson, and Douglas Warshof.

Washington, D.C.

May 16, 2019

Certificate of Service

This is to certify that the attached Decision and Order in PERB Case No. 18-U-02, Opinion No. 1709 was sent by File and ServeXpress to the following parties on this the 20th day of May 2019.

Adessa Barker, Esq.
Office of Labor Relations and Collective Bargaining
441 Fourth Street, NW
Suite 820 North
Washington, D.C. 20001

Benjamin E. Bryant, Esq.
AFGE Local 1403
441 Fourth Street, NW
Suite 630 South
Washington, D.C. 20001

_____/s/_____
Andrea Lozada