

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Teamsters Local Unions 639 and 670,)	
International Brotherhood of Teamsters, AFL-CIO,)	
)	
Complainants,)	PERB Case No. 02-U-26
)	
v.)	
)	Opinion No. 804
District of Columbia Public Schools,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the Case:

On July 9, 2002, Teamsters Locals 639 and 670, International Brotherhood of Teamsters, AFL-CIO, (“Unions” or “Complainants”) filed an Unfair Labor Practice Complaint (“Complaint”) in the above-referenced case. The Complainants alleged that the District of Columbia Public Schools (“DCPS” or “Respondent”) violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) failing to provide information necessary to perform their duty as the bargaining unit representative, and (2) refusing to bargain over the impact and effect of privatization (i.e., converting full-time positions to part-time positions). In its Answer to the Unfair Labor Practice Complaint (“Answer”), the Respondent denied that it failed to provide information or that privatization took place. As a result, the Respondent requested dismissal of the Complaint.

This case was assigned to a Hearing Examiner who determined that the Respondent failed to provide information upon request in violation of D.C. Code § 1-617.04(a)(1) and (5) and granted the Complainants costs on this basis. However, the Hearing Examiner also found that the Complainants failed to show that the Respondent privatized the positions in question or changed bargaining unit positions from full-time to part-time. Therefore, the Hearing Examiner dismissed the portion of the Complaint concerning the Respondent’s duty to bargain over the impact and effects of the alleged privatization. The Complainants filed Exceptions to the Hearing Examiner’s Report and Recommendations (“R&R”) and requested sanctions.

Specifically, the Complainants took exception to the Hearing Examiner's factual findings that there was no privatization and his conclusion that the Respondent had no duty to bargain over the impact and effects of the alleged privatization.

There are two issues for the Board's consideration: (1) Whether the Hearing Examiner's R&R should be adopted in light of the Exceptions filed by the Complainants, and (2) Whether the request for sanctions and costs should be granted.

II. Background

The Complainants have been certified by this Board as the exclusive representatives of several positions employed by the Respondent. (Complaint at pgs. 2-3) On February 19, 2002, Local 639 President John Catlett notified Superintendent Paul Vance that he had heard rumors that the bargaining unit work in the individual schools, at Penn Center, and at Kramer Annex would be contracted out. Mr. Catlett requested information about the proposed privatization and requested bargaining over the impact and effects of contracting out bargaining unit work. (Complaint at p. 3, R&R at p. 2) On June 7, 2002, DCPS responded to the Complainants, as will be discussed below.

The Complainants made several more requests for information between February and June 2002. Further, the Unions identified two requests to negotiate over the impact and effects of contracting out bargaining unit work. In the first request to bargain dated February 19, 2002, Mr. Catlett stated to the Respondent:

I am again receiving reports that DCPS management has plans to contract out Teamster bargaining unit work. . . . This letter is a formal request to negotiate over the effect of any and all proposed changes and efforts that may impact on Teamster bargaining unit work. (R&R at p. 2)

In the Complainants' Unions second alleged request to bargain, by letter dated June 20, 2002, Mr. Catlett stated:

It has come to my attention that DCPS is advertising for part-time custodians for employment in the school system. These part-time custodians will be doing the work of Teamsters DCPS custodians who you are terminating.

This letter serves as a class action grievance for:

1. The terminations of all Teamster custodians you are firing under the guise of "budgetary pressures".

2. The unlawful transferring of Teamster bargaining unit work to non-Union, part-time employees. This is a clear contract violation.
3. The contracting out of Teamster bargaining unit work in violation of the Labor Agreement. (TR. at p. 13, R&R pgs. at 6-7)

Mr. Catlett considered this June 20, 2002 communication to be a request to bargain. DCPS did not respond to this request. (R&R at p. 7)

In light of the above, the Complainants filed an unfair labor practice Complaint on July 9, 2002. The Complainants asserted that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) failing to provide the requested information; (2) refusing to bargain over the impact and effects of the privatization of bargaining unit work; and (3) replacing full-time employees with part-time employees. The Complainants requested that the Board order the Respondent to: (1) provide the requested information; (2) cease and desist from privatizing any bargaining unit work without first negotiating in good faith over the impact and effects of such privatization; (3) bargain with the Unions over privatization of bargaining unit work; and (4) pay costs associated with this Complaint. (Complaint at pgs. 4 -5)

On August 5, 2002 (after this Complaint was filed), the Respondent replied to the Unions concerning their request to bargain as follows: "Pursuant to your letter of June 20, 2002, please be advised that the District of Columbia Public Schools has not contracted out services in lieu of the recent transformation of central office and part of the reduction in force." (Answer p. 3, R&R at p. 5)

Also, on August 5, 2002, the DCPS filed its Answer to the unfair labor practice Complaint ("Answer"), asserting that it had responded to the Unions' request for information to the extent the information existed and that it had not privatized work performed by employees represented by the Complainants. (Answer at pgs. 2-3) In its Answer, DCPS further argued that: (1) it responded on August 5, 2002; to the June 20th request regarding contracting out services (Answer at p. 2); (2) it provided the names, grades and work title of each employee who received a letter of abolishment or reduction in force as a result of the central office transformation (Answer at p.2); and (3) there was no privatization of bargaining unit work performed by bargaining unit employees (Answer at p. 3). As a result, the Respondent requested that the Complaint be dismissed. (Answer at p. 4).

III. Hearing Examiners Report

The Complainants argued before the Hearing Examiner that they repeatedly made requests for information and for impact and effects bargaining over the conversion of bargaining unit work from full-time to part-time. However, they received some of the information late and

did not receive some of the information at all. In addition, the Complainants offered: (1) a May 30, 2002 letter giving notice of position abolishment to a custodial employee and (2) a Master Vacancy List as of June 11, 2002, listing a few part-time positions (Complaint, Exhibit 8) - as proof that the Respondent had contracted out bargaining unit work and converted full-time positions into part-time positions. In its defense, the Respondent argued before the arbitrator that it did not convert any bargaining unit positions from full-time to part-time and that all the information requested by the Unions had been provided.

On January 31, 2003, the Hearing Examiner issued the R&R in this matter. The Hearing Examiner considered the Unions' argument that DCPS did not respond to their requests for information in a timely manner, or did not respond at all. He stated that as part of its obligation to bargain in good faith, an agency must provide information requested by a union that is relevant and necessary for the union to carry out its responsibilities as exclusive representative of employees, and must provide the information in a timely manner. (R&R at p. 10) Citing *Doctors Council of D.C. General Hospital v. D.C. Health and Hospitals Public Benefit Corp.*,¹ the Hearing Examiner noted that this Board had held that an agency does not satisfy its statutory obligation by eventual but belated responses to requests for information, particularly responses that are provided only after an unfair labor practice complaint has been filed. He stated that it is not enough that the agency respond, but it must do so in a timely manner. After reviewing the evidence, he determined that in this case DCPS did not respond to some of the Unions' requests and responded to others only after the Unions filed a Complaint. As a result, the Hearing Examiner concluded that the failure of DCPS to respond to the Unions' Request Nos. 2 through 6 violated D. C. Code § 1-617.04(a)(1) and (5). Further, he concluded that the Respondent's position [concerning its unfounded belief that the Unions had received the requested information] was wholly without merit and accordingly, the Complainants are entitled to reimbursement of reasonable costs from the Respondent. (R&R at p. 14)

The Complainants also argued that the Respondent had a duty to bargain over the impact and effects of the privatization of bargaining unit work and conversion of full-time positions to part-time positions. The Hearing Examiner held that the Respondent's failure to negotiate with the Unions was an unfair labor practice only to the extent that a duty to bargain existed. Here, the Respondent denied the factual premise of the Complainants request to bargain.

Upon reviewing the evidence, the Hearing Examiner found that the Unions did not prove that any bargaining unit work was contracted out or that any bargaining unit position was converted from full-time to part-time. Specifically, he found that "the letter of position abolishment simply indicat[es] that a custodial employee's position was being abolished; nothing in the letter shows that the position was restructured or reestablished as a part-time position. The

¹Slip Op. No. 641, PERB Case No. 00-U-29 (2000), 47 D.C. Reg. 10108. See also, *Providence Hospital and Mercy Hospital and Massachusetts Nurses Association*, 320 NLRB 790, 794 (1996).

master Vacancy List does identify a handful of vacant positions as part-time, but there is nothing contained in the list to support a conclusion that these positions had previously been full-time.” (R&R at p. 14) In the absence of such evidence, the Hearing Examiner concluded that the Complainants did not meet their burden of proof in this regard. On this basis, he concluded that to the extent the Unions letters dated February 19, 2002, and June 20, 2002, were requests to bargain over the contracting out of bargaining unit work, no obligation to bargain existed because the underlying premise - that work had been contracted out or that bargaining unit positions were changed from full-time to part-time - had not been proven. (R&R at pgs. 13-14) In view of his findings, he concluded that the Respondent’s failure to bargain was not an unfair labor practice. (R&R at pgs. 14-15)

The Complainants filed Exceptions to the Hearing Examiners R&R concerning the issue of the Respondents failure to negotiate over the impact and effects of contracting out or converting bargaining unit work from full-time to part-time. The Respondents did not file an Opposition. The Complainants’ Exceptions can be divided into exceptions pertaining to the Hearing Examiners factual findings, (Exception Nos. 1-3)², and exceptions pertaining to the legal conclusions resulting from his findings of fact. (Exceptions Nos. 4-5)³ Specifically, the Complainants take issue with the Hearing Examiner’s finding that no bargaining unit positions were converted from full-time to part-time and argue that he failed to consider all the relevant evidence. (Exceptions at p. 7) The Complainants contend that the Hearing Examiner should have extrapolated from the facts presented that bargaining unit work was being converted from full-time to part-time and should have recommended a remedy accordingly. They further assert that “the Hearing Examiner relied upon a denial not properly in the record to find that the Respondent had no obligation to bargain regarding the conversion of unit work”. (Exceptions, p. 11) The Complainants would have the Hearing Examiner reject the Respondent’s August 6, 2002 Answer to their Complaint.

²The Complainants challenged: “(1) *The Hearing Examiner’s finding that the Respondent asserted that no bargaining unit positions were in fact converted from full-time to part-time as this finding is not supported by the record.* (2) *The Hearing Examiner’s finding that Complainants presented no persuasive evidence to refute Respondent’s purported assertion that no bargaining unit positions were in fact converted from full-time to part-time.* (3) *The Hearing Examiner’s failure to draw logical inferences from the record and from the factual findings he did make.*” (Emphasis added) (Exceptions, pgs. 1-2)

³The Complainants also challenged: “(4) *The Hearing Examiner’s conclusion and recommendation that the Respondent had no obligation to bargain over the conversion of bargaining unit positions from full-time to part-time, and* (5) *[His] failure to address and recommend appropriate remedies based on his conclusion that Respondent had no obligation to bargain including that PERB order DCPS to cease and desist from unilaterally altering the agreed-upon bargaining units, including the transfer and conversion of bargaining unit work from full-time bargaining unit employees to part-time, before negotiating in good faith with the Union concerning the impact of its transfer and conversion of such work on bargaining unit employees.*” (Emphasis added) (Exceptions, p. 2)

Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Upon a review of the evidence in this matter, the Hearing Examiner found insufficient evidence to establish that the Respondent contracted out or converted bargaining unit work from full-time to part-time.

A review of the record reveals that the Complainants' Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. See, *American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also rejected challenges to the Hearing Examiners finding based on (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees v. Local 2741 v. D.C. Department of Recreation Parks*, 46 D.C. Reg. 6502; Slip Op. No. 588, PERB Case No. 98-U-16 (1999); *American Federation of Government Employees v. District of Columbia Water Authority*, Slip Op. 702, PERB Case No. 00-U-12 (2003). Similarly, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451, at p. 4, PERB Case No. 95-U-02 (1995). See also, *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, Slip Op. No. 285, PERB Case No. 86-U-16 (1992), 39 D.C. Reg. 6238; *Charles Bagenstose, et al. v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991).

We conclude that the Hearing Examiner's findings that no work was contracted out and that no bargaining unit positions were converted from full-time to part-time are reasonable and supported by the record. Therefore, we also conclude that the Respondents did not commit an unfair labor practice by refusing to bargain concerning the contracting out of bargaining unit work or converting bargaining unit work from full-time to part-time.⁴

In the present case, DCPS failed to comply with some of the Unions' requests for information, and did not comply with other requests until after the Complaint was filed. "[The

⁴It was not enough for the Complainants to state that DCPS had plans to contract out bargaining unit work. Even if this were true, the Board has held that where an employer decides not to implement or suspends implementation of a management right decision, no duty to bargain over its impact and effects exists. See *Fraternal Order of Police v. Metropolitan Police Department*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999), where MPD proposed a change, but later decided not to implement the change. Under the facts of *FOP v. MPD*, the Board found that it was premature to conclude that MPD had violated the Comprehensive Merit Personnel Act "CMPA" by failing to bargain over a proposed, but unimplemented change. *Id.*

Board has] previously held that an agency's failure to provide requested information in a timely manner, constitutes a violation of D.C. Code § 1-618.4(a)(1) and (5)." *Doctors Council of D.C. General Hospital v. D.C. General Hospital*, Slip Op. No. 482, PERB Case Nos. 95-U-10, 95-U-18 (1996); *Doctors Council of the D.C. General Hospital v. D.C. General Hospitals Public Benefit Corporation*, Slip Op. No. 641, PERB Case No. 00-U-29 (2000), 47 D.C. Reg. 10108. As a result, the Hearing Examiner found that DCPS's failure to provide the Unions with the requested information and its failure to provide the information in a timely manner violated the CMPA.

The Complainants have requested that costs be awarded. D.C. Code § 1-618.13(d) provides that "The Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." Further, we have articulated an interest of justice criteria in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000). In *AFSCME, Council 20*, we addressed the criteria for determining whether a successful unfair labor practice complainant should be awarded costs in its Decision and Order:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the nub of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

In the present case, it is clear that the Unions made requests for information repeatedly and DCPS did not comply with some of the requests at all and did not comply with others until *after* the Unions filed their Complaint. Therefore, the Unions prevailed in their unfair labor practice complaint regarding the failure of DCPS to provide information. Further, the Hearing

Examiner found that DCPS offered no explanation as to why it could not provide the necessary and relevant information requested by the Unions (regarding Requests 1, 5, and 6) or why it could not provide the responses in a timely manner (Requests 2, 3, and 4). As a result, the Hearing Examiner concluded that DCPS's position was wholly without merit and recommended that the Board award costs in this case. We find that the Hearing Examiner's findings as to the awarding of reasonable costs is supported by the record, reasonable and consistent with our holding in *AFSCME, Council 20, Id.* Therefore, we grant the Complainants' request for reasonable costs.

Pursuant to D.C. Code § 1-605.02 (3) (2001) and Board Rule 520.14, the Board adopts the Hearing Examiners Report and Recommendations.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiners findings and recommendations are adopted. Therefore, that portion of the unfair labor practice complaint filed by Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters, AFL-CIO (Teamsters, Local 639 and 670) against the District of Columbia Public Schools (DCPS) alleging a refusal to bargain over the conversion of full-time bargaining unit positions to part-time, is dismissed.
2. The Hearing Examiners findings and recommendations that DCPS failed to provide relevant and necessary information to Teamsters, Local 639 and 670, in violation of D.C. Code § 1-617.04(a)(1) and (5) (2001), are adopted to the extent that this information is not moot.
3. The Hearing Examiners findings and recommendations that DCPS failed to provide relevant and necessary information to Teamsters, Local 639 and 670, in a timely manner, in violation of D.C. Code § 1-617.04(a)(1) and (5) (2001), are adopted to the extent that this information is not moot.
4. DCPS, its agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act (CMPA) in any like or related matter.
5. DCPS shall post conspicuously within ten (10) days from the service of this Decision and Order, the attached Notice, admitting the above noted violations where notices to employees are normally posted.

6. DCPS shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DCPS shall notify PERB of the steps it has taken to comply with the directives in paragraphs 2, 3, 4 and 5 of this Order.
7. The Complainant shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of actual costs incurred processing this action. The statement of costs shall be filed together with supporting documentation. DCPS may file a response to the statement within fourteen (14) days from service of the statement upon it.
8. DCPS shall pay the Complainants their reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.
9. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

December 16, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 02-U-26 was transmitted via Fax and U.S. Mail to the following parties on this the 16th day of December 2005.

Jonathan Axelrod, Esq.
Beins, Axelrod, Kraft, Gleason
& Gibson, P.C.
1717 Massachusetts Ave., N.W.
Suite 704
Washington, D.C. 20036

FAX & U.S. MAIL

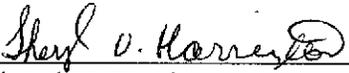
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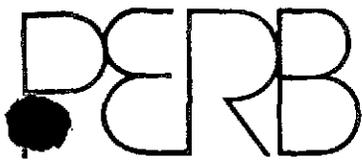
Courtesy Copy:

Thomas Ratliff, President
Teamsters Local 639
3100 Ames Place, N.E.
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U.S. MAIL



Sheryl V. Harrington
Secretary



Public
Employee
Relations
Board

Government of the
District of Columbia



415 Twelfth Street, N.W.
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS (DCPS), 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. 804, PERB CASE NO. 02-U-26 (December 16, 2005).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 804.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA) to freely: (a) form, join, or assist any labor organization and (b) bargain collectively through representatives of their own choosing.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Public Schools

Date: _____ By _____
Director

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

If employees have any questions concerning the Notice or compliance with any of its provisions they may communicate directly with the Public Employee Relations board, whose address is: 717 14th Street, N.W., 11th Floor, Washington, D.C. 20005. Phone: (202) 727-1822

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

December 16, 2005

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of: *

Teamsters Local Unions 639 and 670, *

Complainants *

v. *

PERB Case No. 02-U-26

District of Columbia Public Schools, *

Respondent *

Before: Barry E. Shapiro, Hearing Examiner

REPORT OF FINDINGS AND RECOMMENDATIONS

This case involves an Unfair Labor Practice Complaint (Complaint) filed by Teamsters Locals 639 and 730 (Complainants or Teamsters) on July 9, 2002, alleging that the District of Columbia Public Schools (Respondent or DCPS) violated DCC §§1-617.04(a)(1) and (5)¹ by refusing to provide requested information and refusing to bargain over the impact of privatization. Respondent submitted its Answer to Unfair Labor Practice Complaint (Answer) on August 5, 2002, denying that it had committed the alleged unfair labor practices, and requesting that the Complaint be dismissed.

A hearing was held before the undersigned on October 3, 2002. At the hearing, Complainants were represented by Jonathan G. Axelrod, Esq., and Respondent by Melisa D. Bennet, Esq. The only witness was John D. Catlett, President, Teamsters Local 639, who appeared for Complainants. Pursuant to PERB Rule 551.1, a stenographic transcript (Tr.) was prepared and constitutes the official record of the hearing. The Parties submitted post-hearing briefs on December 2, 2002.

FACTUAL BACKGROUND

Complainants have been certified by PERB, either jointly or individually, as the exclusive representatives of several bargaining units of Respondent's employees. See Complaint, ¶¶ 4-7.

¹The reenactment of the District of Columbia Code in 2001 resulted in the renumbering of sections dealing with labor-management relations. The Complaint cites the old numbering, §1-618.4(a)(1) and (5). All references in this Report are to the 2001 version.

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Complainants and Respondent are parties to a collective bargaining agreement. See Complaint, ¶8.

The Complaint identifies several requests for information and/or requests to bargain to which Respondent allegedly failed to respond at all, or failed to respond in a timely manner. These requests are contained in several documents attached to the Complaint, or in telephone calls referred to in those attached documents. For purposes of this Report, I have grouped these requests under seven headings.

Request 1:

On February 19, 2002, John Catlett, President, Teamsters Local 639, wrote to Dr. Paul Vance, Superintendent, DCPS, about the contracting out of bargaining unit work (Complaint, ¶9 and Exhibit 1):

I am again receiving reports that DCPS management has plans to contract out Teamster bargaining unit work. The rumor I have heard is that all Teamster bargaining unit work in 50 schools will be contracted out along with Teamster bargaining unit work in skilled classifications at the Penn Center and Kramer Annex.

The Labor Agreement between Teamster Locals 639/730 and DCPS requires that a 60-day notice be given for any contracting out of bargaining unit work.

This letter is a formal request to negotiate over the effect of any and all proposed changes and efforts that may impact on Teamster bargaining unit work....

In its Answer (¶10), Respondent asserted that it responded to this February 19 letter by its letter of August 5, 2002 (Answer, Attachment 1), which stated:

Pursuant to your letter of June 20, 2002, please be advised that the District of Columbia Public Schools has not contracted out services in lieu of the recent transformation² of central office and part of the reduction in force.

²As described by the parties at the hearing, transformation was an effort in which all DCPS positions in or under the central office were restructured or redescribed, and in which incumbent employees were required to reapply for their positions. In some cases, employees lost their positions because they did not possess the qualifications for the redescribed positions. There is

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In the Complaint (§10), Complainants stated that Respondent did not respond to this letter by confirming or denying the rumors, by supplying information, or by bargaining with Complainants. Catlett testified (Tr. 10) that he received Respondent's letter on or about August 5.

Request 2:

Catlett wrote to DCPS General Counsel Veleter Mazyck on June 7, 2002, asking him for certain information (Complaint, §11 and Exhibit 2):

During yesterday's court hearing and in our telephone conversation today, you promised to provide me with an accurate list of the Teamster employees DCPS is firing. This list would be broken down into two parts. One part would list Teamsters by name, classification and grades that DCPS fired using the "RIF" procedure. The second part would list Teamsters by name, classification and grade that DCPS fired using the "abolish" procedure.

During today's conversation, I requested the names, grades and schools of the custodians DCPS is firing.

As you know, Teamsters Locals 639/730 must have this information to properly represent our members.

Mazyck responded to this letter by e-mail on June 7, to which he attached two spreadsheets (Answer, §13 and Attachment 2):

The first spreadsheet entitled Teamsters Letters will provide the name, wage grade and work title for each Teamster who received a letter of abolishment of position or reduction in force as a result of the central office transformation. Those employees who served in a position in which the total number of positions was reduced, and they received a letter based upon seniority ranking within the position, are denoted by a "1" in the last column entitled "By Seniority" of the first spreadsheet - "Teamsters Letters."

The second spreadsheet in the attached workbook is entitled Teamsters Rescinds. That worksheet provides the name, wage grade, CBU code, tour of duty, and work title for every member who received a letter of abolishment or reduction in force as a result of central office transformation, but whose letter was rescinded.

ongoing litigation between the parties over the transformation effort; the substance of that litigation is not at issue in this unfair labor practice proceeding.

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These names were removed from that Teamsters Letters spreadsheet as rescission letters were issued, and their names were then placed on the Teamsters Rescinds spreadsheet.

If you have any questions about the attachment, you may contact me.

During our telephone conversation today, you seemed to equate the central office transformation with the equalization of schools based upon projected student enrollment for 2002-2003 and its impact upon the weighted student formula. The equalization process is totally unrelated to the central office transformation, and, as you know, occurs every year after the local schools' restructuring teams develop the local school plans for the coming school year. You asked that I provide the list of all [Local] 639 members who received excess letters as a result of equalization, and I indicated that I would request the list from the Office of Human Resources. However, that process and those notices are unrelated to the central office transformation, which is the subject of your local's pending motion for temporary restraining order and preliminary injunction in the U. S. District Court.

When I have an indication of the date of availability of the response to your unrelated request, I will advise you.

Catlett testified that he received this e-mail message and its attachments, but that he never received the requested information about the work locations of employees being fired (Tr. 11). Complainants note that Catlett reiterated his June 7 request on June 20 (Complaint, Exhibit 7³):

Furthermore, on June 7, 2002, I requested the names, grades, and schools of the custodians you are firing. This request for information has been ignored, as have almost all of my requests for information relating to firing of Teamster members.

Request 3:

In a letter of June 10, 2002 (Complaint, ¶14 and Exhibit 4), Catlett asked Vance for information concerning Teamster firings:

In order that Local #639 may properly represent the fired DCPS Teamsters, I will need all relevant seniority lists, and, as these DCPS Teamsters face an immediate

³The Complaint (¶12), apparently erroneously, identifies Exhibit 3, another letter dated June 20, as the reiteration of the June 7 request.

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loss of income and benefits, I will need the lists as soon as possible.

In its Answer (§15), Respondent asserted that "Upon information and belief, the Complainants did receive the requested information." Catlett testified (Tr. 11) that he never received these seniority lists.

Request 4:

In another letter of June 10 (Complaint, §16 and Exhibit 5), Catlett --

request[ed] a copy of the Arthur Anderson report that led to the "Center Office Transformation," along with the credentials of the Arthur Anderson expert(s) who "re-wrote" the job descriptions of Teamster bargaining unit work.

I need this information to properly represent all the DCPS Teamsters you fired.

Catlett testified (Tr. 12) that he did not receive "any information that was supplied to the Schools by Arthur Andersen". Respondent asserts that "there is no Arthur Andersen report that led to the central office transformation. Instead, the only document is a task order Agreement", a copy of which it attached to its Answer (§17 and Attachment 3).

Request 5:

In a letter of June 11, 2002 (Complaint, §18 and Exhibit 6), Catlett requested the following information:

DCPS has fired two locksmiths. Please furnish me with the names and addresses of all locksmith companies DCPS has contracts with.

I need this information to properly represent the fired locksmiths.

On August 5, 2002, Respondent informed Complainants (Answer, §19 and Attachment 4) --

Pursuant to your letter of June 11, 2002, please be advised that the District of Columbia Public Schools has not contracted out locksmith services. The two locksmiths on staff were indeed affected by the recent transformation of central office and part of the reduction in force.

Catlett testified that he received this letter shortly after August 5 (Tr. 12).

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Request 6:

On June 20, 2002, Catlett submitted to Vance the following request for information about contracting out (Complaint, ¶12 and Exhibit 3):

DCPS is taking bids from contractors to do work for DCPS that is being done by the Teamsters you are firing.

The Labor Agreement requires that 60 days' notice must be given to Teamster Locals 639/730 if contracting out is planned. I have received no such notice.

This letter serves as a class action grievance for these contract violations.

In order to properly represent my members, please furnish me with the names, addresses and cost information of all contractors that perform Teamster bargaining unit work.

Vance sent a letter to Catlett on August 5 (Answer, ¶13 and Attachment 1):

Pursuant to your letter of June 20, 2002, please be advised that the District of Columbia Public Schools has not contracted out services in lieu of the recent transformation of central office and part of the reduction in force.

As noted above, Catlett testified (Tr. 10) that he received this letter on or about August 5.

Request 7:

Catlett wrote to Vance on June 20, 2002 (Complaint, ¶20 and Exhibit 7⁴):

It has come to my attention that DCPS is advertising for part-time custodians for employment in the school system.

⁴The Complaint (¶20) identifies this letter as a reiteration of the request for information and bargaining originally made on February 19 (Complaint, Exhibit 1). Nothing in this letter, however, clearly relates to the matters raised in the February 19 letter. As noted above, this letter contains, in part, a reiteration of the request for information made originally on June 7 (see Request 2).

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These part-time custodians will be doing the work of Teamsters DCPS custodians who you are terminating.

This letter serves as a class action grievance for:

1. The terminations of all Teamster custodians you are firing under the guise of "budgetary pressures."
2. The unlawful transferring of Teamster bargaining unit work to non-Union, part-time employees. This is a clear contract violation.
3. The contracting out of Teamster bargaining unit work in violation of the Labor Agreement.⁵

Catlett testified that this letter constituted a request to bargain over the conversion of full-time custodians to part-time. In support of its contention that such conversions were going on, Complainants offer a copy of a letter of position abolishment sent to a custodial employee on May 30, 2002, and a Master Vacancy List as of June 11, 2002 (Complaint, Exhibit 8). Catlett testified that Respondent did not respond to this request (Tr. 13).

The Complaint

Complainants filed the instant Complaint on July 9, 2002. Complainants asserted that by failing to provide the requested information, and by refusing to bargain over the impact and effects of privatization of bargaining unit work and the replacement of full-time employees with part-time employees, Respondent had violated DCC §1-617.04(a)(1) and (5).

The Answer

Respondent submitted its Answer to Unfair Labor Practice Complaint on August 5. Respondent asserted that it had responded to Complainants' requests for information to the extent the information existed (Answer, ¶¶10, 13, 15, 17, and 19), and that it had not privatized work performed by employees represented by Complainants (Answer, ¶21). Respondent asked that the Complaint be dismissed.

POSITIONS OF THE PARTIES

⁵The letter continued with the reiteration of an earlier request for information; see description of Request 2.

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Complainants

Complainants argue that PERB has previously held that the statutory duty to bargain in good faith (DCC §1-617.04(a)(5)) includes the obligation for an agency to provide a union information necessary for the union to bargain.⁶ In the instant case, Complainants assert, Catlett wrote to DCPS several times to request information. There is no dispute that the requests were received by Respondent, nor that Respondent failed to respond in a timely manner.

Some of the requested information, Complainants state, was eventually received. Delays in responding to those requests, however, are unlawful. It is no defense against an unfair labor practice charge for an agency to provide the requested information after a complaint is filed.⁷ In the instant case, information was requested on February 19; when no answer was received, the Complaint was filed on July 9. The responses that were finally sent on August 5 are untimely because they were not sent until after the filing of the Complaint. Respondent's belated willingness to comply with the request does not cure a seven-month refusal do so. Complainant cites several National Labor Relations Board decisions in support of this assertion.⁸

Other requested information, Complainants state, was never received. Specifically, Complainants state that no answers were received in response to their requests of June 7 (Complaint, ¶11 and Exhibit 2), June 10 (Complaint, ¶¶14 and 16, and Exhibits 4 and 5), or June 20 (Complaint, ¶¶13 and Exhibit 3).

Respondent, Complainants asserts, also refused to bargain about the central office transformation and the conversion of full-time positions to part-time. While an agency is not prohibited from acting unilaterally in its exercise of management rights (cite DCC), it must

⁶Complainants cite *Doctors Council of D. C. General Hospital v. D. C. Health and Hospitals Public Benefit Corp.*, PERB Case No. 00-U-29, Opinion No. 641 (2000); *Doctors Council of D. C. General Hospital v. D. C. General Hospital*, PERB Case Nos. 95-U-10 and 95-U-18, Opinion No. 482 (1996); and *American Federation of Government Employees Local 872 v. D. C. Department of Public Works*, Case Nos. 94-U-02 and 94-U-08, Opinion No. 439 (1995).

⁷See PERB Case No. 00-U-20, Opinion No. 641.

⁸*Bundy Corp.*, 292 NLRB 109 (1989); *Ellsworth Sheet Metal, Inc.*, 232 NLRB 109 (1977); *Operating Engineers, Local 12*, 237 NLRB 1556 (1798); *Newspaper Drivers Local 921 (San Francisco Newspaper Agency)*, 309 NLRB 901 (1992).

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bargain with a union about the impact and effects of the exercise of that right.⁹ In this case, it is undisputed that Complainants asked on February 19 to bargain about the impact and effects of the transformation on bargaining unit employees; and undisputed that Respondent did not offer to bargain about the transformation or make any proposals to Complainants. Accordingly, Complainants assert, Respondent violated DCC §1-617.04(a)(5).

As remedies, Complainants ask that PERB direct Respondent to:

- 1) Provide the requested information;
- 2) Cease and desist from privatizing any bargaining unit work without first negotiating in good faith over the impact and effects of such privatization;
- 3) Bargain with Complainants over privatization of bargaining unit work; and
- 4) Pay costs associated with this Complaint.

Respondent

Respondent states that it provided the requested information to Complainants (Answer, ¶¶10-23). In a June 20, 2002 e-mail message (Answer, ¶13 and Attachment 2) it provided the requested RIF seniority lists. In two letters of August 5 (Answer, ¶¶10, 19, and 21, and Attachments 1 and 4) it informed Complainants that there had been no contracting out. In addition, Respondent states that it provided a copy of its Task Order Agreement with Arthur Anderson (Answer, ¶17 and Attachment 3), since there was no Arthur Anderson report.

Respondent argues that Complainants have failed to state a claim for which relief may be granted. All the requested information requested by Complainants was provided to them. There has been no privatization of bargaining unit work; Catlett testified that he saw contractors at schools, but did not identify which schools and provided no other documentation in support of his claims that work had been privatized. The Complaint should be dismissed.

DISCUSSION

It is well-established by PERB case law that:

⁹*American Federation of Government Employees, Local 2725 v D. C. Department of Public and Assisted Housing*, PERB Case No. 92-U-21, Opinion No. 404 (1994); *University of the District of Columbia Faculty Association v. University of the District of Columbia*, PERB Case No. 82-N-01, Opinion No. 43 (1982).

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- As part of its obligation to bargain in good faith, an agency must provide information requested by a union that is relevant and necessary for the union to carry out its responsibilities as exclusive representative of employees, and must provide the information in a timely manner.
- An agency has an obligation to bargain with a union over the impact and effect of its exercise of a management right, even if the exercise of the right is itself outside the duty to bargain.

Although PERB has issued several rulings involving union requests for information or bargaining over the impact and implementation of an agency's exercise of management rights, the number of such cases is not large, and not all possible factual variations have been addressed. PERB often refers to case law developed by the National Labor Relations Board in its administration of the National Labor Relations Act when the statutory provisions of the NLRA and the District's Comprehensive Merit Personnel Act are similar. Inasmuch as DCC §1-617.04(a) is modeled on section 8(a) of the NLRA, reference to NLRB case law in the matters raised in this Complaint is appropriate.

In the instant case, the Respondent does not dispute that it received the Complainants' various requests for information and/or requests to bargain on or about the dates of the letters or telephone calls transmitting those requests; nor does it assert that the information requested by Complainants is not necessary or relevant to Complainants' role as exclusive representative of Respondent's employees. The questions to be answered here are:

- Did Respondent provide the requested information and/or opportunity to bargain?
- Did Respondent provide the requested information and/or opportunity to bargain in a timely manner?

The answers to each of the seven requests identified above will be considered in turn.

Request 1:

The February 19 letter is, by its own terms, a request for bargaining triggered by "reports" that came to Complainants' attention to the effect that Respondent had plans to contract out bargaining unit work. The request demanded a response: either a confirmation by Respondent that Complainants' premise about contracting out was correct, followed by bargaining; or a denial of the premise. In other words, implicit in the request to bargain was a request for information. No response at all, or an untimely response, interfered with the Complainants' ability to carry out

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its role as exclusive representative of Respondent's employees.

There is no black-letter law that speaks to the speed with which an agency must respond to a request for information, and no bright line that distinguishes in all cases between timely and untimely responses. Each case must be considered in light of the circumstances that surround it. In this case, Respondent offers no explanation as to why it took nearly six months -- and nearly a month after the Complaint was filed -- to respond to the request, and no legitimate explanation is readily apparent. The answer to the request was a simple denial of Complainants' belief that work was being contracted out, and could presumably have been provided with little delay. Both PERB and the NLRB have held that an agency or employer does not satisfy its statutory obligation by eventual but belated responses, particularly responses that are provided only after an unfair labor practice complaint has been filed. See *Doctors Council of D. C. General Hospital v. D. C. Health and Hospitals Public Benefit Corp.*, PERB Case No. 00-U-29, Opinion No. 641 (2000); and *Providence Hospital and Mercy Hospital and Massachusetts Nurses Association*, 320 NLRB 790, 794 (1996). In the circumstances of the instant case, the response eventually provided by Respondent on August 5 was untimely. The failure to provide a timely response to Complainants' February 19 letter violated DCC §1-617-04 (a)(1) and (5).

Catlett's February 19, 2002 letter, as noted above, cites "reports" that Respondent has plans to contract out bargaining unit work, and asks "to negotiate over the effect of any and all proposed changes and efforts that may impact on Teamster bargaining unit work." While the phrase "any and all proposed changes and efforts that may impact on Teamster bargaining unit work" is rather broad, it must be read in context of the "reports" about contracting out received by Complainants, and therefore as a request to bargain over the effects of that contracting out on bargaining unit work. Although Complainants characterize this letter as a request to bargain over the impact of central office transformation (Complainants' Brief at page 8), neither the letter itself nor the Complaint filed on July 9 make reference to the transformation effort; the relationship of this request to the transformation is first raised in Complainants' Brief. Furthermore, the letter refers to planned actions that would affect bargaining unit employees at 50 schools; the transformation effort applied only to central office employees.

An agency's refusal or failure to negotiate with a union is an unfair labor practice only to the extent a duty to bargain exists. In the instant case, Respondent denies the factual premise of Complainants' request to bargain -- that there is any contracting out of bargaining unit work -- and Complainants offer no persuasive evidence that work has in fact been contracted out. To the extent the February 19 letter is a request to bargain over contracting out, Respondent had no obligation to bargain, and its failure to do so is not an unfair labor practice.

Request 2:

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Complainants do not dispute that Mazyck's June 7, 2002 e-mail message and its attachments satisfied the request made by Catlett in his letter of June 7 for information about employees affected by central office transformation. That same June 7 letter, however, also asked for "the names, grades and schools of the custodians DCPS is firing" that Catlett originally requested by telephone. Mazyck's June 7 e-mail indicates that he understood this request to refer to employees affected by school equalization, and he promised to provide the information as soon as it became available. Catlett testified that he never received this information. Respondent offers no evidence to show that it did in fact provide this information, or that it advised Complainants that the information could not or need not be provided. By failing to provide the requested information, Respondent violated §1-617-04 (a)(1) and (5).

Request 3:

Respondent offers no evidence of any kind to support its assertion that "Upon information and belief, the Complainant did receive the requested information" (Answer, ¶15). This assertion is insufficient to overcome Catlett's sworn testimony that he never received this information. Respondent's failure to provide the requested information is a violation of §1-617-04 (a)(1) and (5).

Request 4:

Respondent asserts that "there is no Arthur Andersen report that led to the central office transformation." It is, however, clear from Catlett's June 10, 2002 letter, in which he requested not merely the Arthur Andersen report but the credentials of the Arthur Andersen experts who re-wrote the job descriptions of bargaining unit employees' work, that he was asking for a copy of the substantive work produced by Arthur Andersen, not the work order that led to that work.

Under NLRB case law:

It is well established that the adequacy of a union's request for information must be judged in the light of "the entire pattern of facts available to [the employer]," not just the bare words of the request itself. (*Gloversville Embossing Corp. and Amalgamated Clothing and Textile Workers Union, AFL-CIO*, 314 NLRB 1258 (1994))

And:

...It is well established that an employer may not simply refuse to comply with an ambiguous and/or over broad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant

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information. (*Azabu USA (Kona) Co., Ltd. And Hotel Employees and Restaurant Employees, Local 5, 298 NLRB 702 (1990)*)

In the context of the entirety of Complainants' written request and the ongoing dispute between the Parties over the central office transformation, Respondent's assertion that "the only document between Arthur Anderson and the Respondent is a task order Agreement" (Answer, ¶17) is disingenuous and non-responsive.

In addition, Respondent's response to the request was not timely. Nothing in the record indicates that Respondent even addressed Complainants' request any earlier than August 5, 2002, when it attached the Task Order Agreement with Arthur Andersen to its Answer (Attachment 3). Respondent offers no explanation of why it took nearly two months -- and nearly a month after the Complaint was filed -- to provide even this inadequate response. Such failure to provide requested information violates §DCC 1-617.04(a)(1) and (5).

Request 5:

Respondent's assertion that its August 5 response to Catlett's June 11 letter satisfied its obligation to provide requested information fails to address the reason for the delay of nearly two months -- and a month after the filing of the Complaint -- in providing the response. As noted above with respect to Request 1, the requested information was straightforward and could have been easily and quickly provided. Respondent's failure to provide the requested information in a timely manner violates §DCC 1-617.04(a)(1) and (5).

Request 6:

As with Request 5, Respondent offers no explanation of why Complainants' straightforward request for information could not be provided except after a nearly two-month delay, including a delay of nearly a month after the Complaint was filed. Respondent's failure to provide the requested information in a timely manner violates §DCC 1-617.04(a)(1) and (5).

Request 7:

Although Complainants characterize Catlett's June 20 letter as a request to bargain over the conversion of full-time bargaining unit positions to part-time, the plain language of the letter indicates that it constituted the filing of a grievance over alleged violations of the parties' collective bargaining agreement. Even if, for the sake of argument, the letter is read as a request to bargain, there is no unfair labor practice. As noted above, the failure to bargain is an unfair labor practice only to the extent a bargaining obligation exists. Complainants have not presented any persuasive evidence to refute Respondent's assertion that no bargaining unit positions were in

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fact converted from full-time to part-time. The letter of position abolishment (Complaint, Exhibit 8) simply indicates that a custodial employee's position was being abolished; nothing in the letter shows that the position was restructured or reestablished as a part-time position. The Master Vacancy List (Complaint, Exhibit 8) does identify a handful of vacant positions as part-time, but there is nothing contained in the list to support a conclusions that these positions had previously been full-time. Absent a showing that the premise on which Complainants' request to bargain was based was factually correct -- and Respondent denies the premise -- Respondent had no obligation to bargain, and accordingly did not commit an unfair labor practice by failing to do so.

Costs

DCC §1-617.13(d) authorizes PERB to order "payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." PERB addressed the criteria for determining whether a successful unfair labor practice complainant should be awarded costs in its Decision and Order in Case No. 89-U-02, Opinion No. 245 (date):

...First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed...Last, and this is the nub of the matter, we believe such an award must be shown to be in the interest of justice.

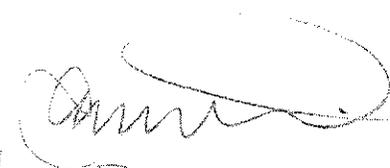
Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued...What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

Id., pages 4-5 (footnote omitted).

In this case, Complainants have clearly prevailed on all the allegations concerning requests for information. Inasmuch as Respondent has offered no explanation as to why it could not provide the necessary and relevant information requested by Complainants (Requests 1, 5, and 6), or could not provide responses in a timely manner (Requests 2, 3, and 4), I conclude that Respondent's position was wholly without merit. Complainants are, accordingly, entitled to reimbursement of reasonable costs from Respondent.

FINDINGS AND RECOMMENDATIONS

- 1) Respondent failed to provide relevant and necessary information to Complainants, in violation of DCC §1-617.04(a)(1) and (5).
- 2) Respondent failed to provide relevant and necessary information to Complainants in a timely manner, in violation of DCC §1-617.04(a)(1) and (5).
- 3) Respondent had no obligation to bargain with Complainants over contracting out of bargaining unit work, or over conversion of full-time bargaining unit positions to part-time.
- 4) Respondent should be directed to post a notice admitting its violations of DCC §1-617.04 (a)(1) and (5), and to cease and desist from refusing to provide necessary and relevant information requested by Complainants.
- 5) Complainants should be offered an opportunity to submit a request for reasonable costs incurred in prosecution of this unfair labor practice complaint.


Jan. 17, 2003