Government of the District of Columbia
Public Employee Relations Board

In the Matter of: American Federation of Government Employees, Locals 631, 872 and 2553; American Federation of State, County and Municipal Employees, Local 2091; and National Association of Government Employees, Local R3-06, Complainants, v. District of Columbia Water and Sewer Authority, Respondent.	PERB Case Nos. 03-U-34 and 03-N-04 Opinion No. 810

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Locals 631, 872 and 2553; the American Federation of State, County and Municipal Employees, Local 2091; and the National Association of Government Employees, Local R3-06 ("Complainants" or "Unions"), filed an Unfair Labor Practice Complaint ("Complaint") in the above-referenced case.[1] This case was assigned PERB Case No. 03-U-34.[2] The Complainants allege that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by refusing to

[1]The Complaint was filed on May 8, 2003.

[2]The Complainants also filed a Motion for Preliminary Relief ("Motion") in PERB Case No. 03-U-34. In Slip Op. No. 721 dated June 6, 2003, we denied the Complainants' Motion and referred the case to a Hearing Examiner.

bargain with the Unions over a matter affecting terms and conditions of employment. Specifically, the Complainants assert that the Respondent "refused to bargain over the implementation of new employee identification cards and new electronic time clocks that will be used for time and attendance." (Complaint at p. 3) The Complainants are requesting that the Board order the Respondent to: (1) cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (2) bargain with the Complainants; (3) cease implementation of the electronic time clock system; (4) make whole any employee who has suffered a loss or been denied benefits; (5) pay the Complainants' costs and attorney fees; and (6) post a notice to employees. (See Complaint at p. 5)

In its Answer to the Unfair Labor Practice Complaint ("Answer"),[3] WASA denies that it committed an unfair labor practice. Specifically, WASA claims that it exercised a management right that was subject only to impact and effects bargaining. On June 6, 2003, the Complainants filed an Amended Complaint alleging that the Respondent dealt directly with employees while refusing to bargain with the Unions. In its Answer to the Amended Complaint,[4] WASA admits the underlying factual allegations but denies that it violated the CMPA.

On May 14, 2003, WASA notified the Complainants that it was going to implement the new time clocks for time and attendance. On May 20, 2003, the Complainants responded to WASA by submitting two proposals which they wanted to be considered by WASA in negotiations pertaining to the time clock system.[5] Subsequently, on June 30, 2003, the Complainants filed a Negotiability Appeal ("Appeal").[6] In the Appeal, the Complainants assert that they were unable to make substantive written proposals concerning the electronic time clock system because WASA refused to provide information that was relevant and necessary to carrying out their function as the exclusive representatives. In response, WASA filed a document styled "Answer to the Negotiability Appeal" ("Response") arguing that the Appeal is not properly before the Board because it does not meet the Board's procedural requirements.[7]

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[3]The Answer was filed on May 28, 2003.

[4]The Answer to the Amended Complaint was filed on June 24, 2003.

[5]The first proposal submitted by the Unions is entitled "Electronic Time Clocks" and provides as follows: "Employer agrees that bargaining unit employee[s] will be exempt from using electronic time clocks for time and attendance." The second proposal is entitled "Identification Badges" and states as follows: "Employer agrees not to use bargaining unit employee identification/facility access cards for time and attendance purposes." (Appeal at p. 3)

[6]The Unions' Appeal was assigned PERB Case No. 03-N-04.

[7]The response to the Negotiability Appeal was filed on November 14, 2003.

Specifically, WASA claims that it never declared in writing that the Unions' proposals were non-negotiable as required by Board Rule 532.2(c). Furthermore, WASA contends that the Appeal was not filed within 30 days as required by Rule 532.3. In addition, WASA asserts that the decision to implement the time clock system is a management right that is not subject to negotiation.[8]

On March 18, 2004, the Hearing Examiner issued a Report of Findings and Recommendations ("R&R") in which she found that the Respondent did not violate the CMPA. Therefore, she recommended that the unfair labor practice complaint and the negotiability appeal be dismissed. The Complainants filed "Exceptions to the Hearing Examiner's R&R" ("Exceptions").[9] Also, the Respondent filed an Opposition to the Complainants' Exceptions.[10]

The Hearing Examiner's R&R, the Complainants' Exceptions and the Respondent's Opposition are before the Board for disposition. For the reasons noted below, the Board adopts the Hearing Examiner's findings and recommendations that both the unfair labor practice complaint and the negotiability appeal should be dismissed.

II. Background:

In 1999, WASA was removed from the District of Columbia payroll system and established its own payroll and personnel system. The data for time and attendance was gathered and compiled manually by clerks employed by WASA. On October 8, 2002, WASA announced to the Complainants its plan to: (1) install an electronic time clock system for the purpose of time and attendance and (2) issue new employee identification cards that interface with the time clocks for the purpose of collecting data. The new system utilized identification badges, also known as facility access cards. These acess cards are "swiped" by employees at data collection terminals which automatically record time and attendance every time they are swiped. There is also a security component. The card has the employee's picture, which serves as an identification badge, and also controls access into certain areas. The Hearing Examiner stated that the system is

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[8]PERB Case Nos. 03-U-34 and 03-N-04 were consolidated by the Board's Executive Director on October 30, 2003. (The Complainants also filed a "Notice of Impasse and Request for Impasse Resolution" on May 29, 2003. The impasse case was assigned PERB Case No. 02-I-08. However, the impasse case was withdrawn at the Complainants' request on June 23, 2003.)

[9]The Executive Director granted the Complainants' request for an extension of time. As a result, the parties' Exceptions were filed on May 13, 2004.

[10]See document styled "Respondent's Opposition to Complainant's Exceptions to the Hearing Examiner's R&R" ("Opposition") filed on June 2, 2004.

agency-wide and affects bargaining unit employees as well as non-union employees. WASA made its first presentation to the Unions concerning the time clock system at a labor-management meeting held in November 2002. (See R&R at p. 7)

The Unions identified the use of electronic time clocks and identification cards as new working conditions because their function is to record data for the purpose of employee compensation and benefits. Therefore, the Unions sought to bargain with WASA over WASA's decision to implement the new system. On November 26, 2002, the Unions wrote to WASA requesting information concerning the new system and requesting to bargain over the new identification card/electronic time clock system. Subsequently, on March 31, 2003, the Unions made a second request to bargain. (See Complaint p. 4). At management-labor meetings held in February and May 2003, the parties held discussions concerning the issue of time clocks and WASA answered questions posed by the Unions. (See R&R at p. 8). Throughout this time, WASA claimed that the new system was merely a new technology and that management had the right to implement the new technology because it did not change any term or condition of employment. In support of its position, WASA asserted that this type of new technology was contemplated by the parties in the "Management Rights" provision of the collective bargaining agreement.[11]

In view of WASA's position that implementation of the time clock system was a reserved management right, the Unions filed an unfair labor practice complaint. In their Complaint, the Unions assert that WASA committed an unfair labor practice by refusing to bargain over the implementation of new employee identification cards and new electronic time clocks. WASA countered that at every labor-management meeting held between January and May 2003, management had discussions with the Unions concerning the data collection terminals. Also, WASA claimed that at meetings held on January 30, 2003, and May 14, 2003 it provided information to the Unions by responding to their questions concerning the time clock system.

By letter dated May 14, 2003, WASA informed the Unions that the electronic time clock system would be installed by the end of July 2003. The Unions responded by letter dated May 20, 2003, that they "consider[ed] the clocks . . .[to be] a change in the methods of keeping time and attendance and a mandatory subject of bargaining under the law." (Appeal at Exh. 2) Consistent with their position, the Unions made two proposals which they wanted to be considered in negotiations.[12]

By letter dated May 27, 2003, WASA announced to its employees that it was going

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[11]WASA relied on Article 4, "Management Rights" of the collective bargaining agreement which states in pertinent part as follows: "[WASA] shall retain the sole right, in accordance with applicable laws and rules and regulations: . . . [t]o determine . . . the technology of performing its work." This provision mirrors the language of D.C. Code § 1-617.08(a)(5).

[12]The Unions' proposals are set forth in footnote 5.

to implement the electronic clock system in July 2003. Subsequently, the Unions amended their Complaint claiming that WASA dealt directly with bargaining unit members when it announced to employees on May 27, 2003, that it was going to install the electronic time clock system.

In a letter dated June 9, 2003, and captioned "Request for Impact and Effects Bargaining Concerning Automated Time and Attendance Data Collection", WASA declared that it was "prepared to meet with [the Unions] to discuss [their] proposals regarding [the electronic time clock issue]." (Appeal, Exh. 5). In response to this letter, the Unions rejected WASA's offer by: (1) requesting "full bargaining" over WASA's decision to install electronic time clocks, and (2) filing a Negotiability Appeal.

III. The Hearing Examiner's Report and Recommendation and the Unions' Exceptions

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified four issues for resolution. Her findings and recommendations are as follows:

> 1. *Did WASA have a duty to bargain with the Unions prior to the implementation of the new time clock system or was the decision a "management right" (requiring only impact and effect bargaining)?*

Before the Hearing Examiner,"[t]he Unions argued that, with the exception of the security component of the new system which they agree[d] was a management right, WASA was obligated to bargain before implementing the new time clock system because it was a significant change from the prior procedures and changed the terms and conditions of employment." (R&R at p. 14) For example, the Unions argued that the time clock system would result in substantial changes to the manner in which salaries are paid and would establish a new basis for disciplinary action, resulting in a change in terms and conditions of employment. WASA countered that implementation of the electronic time clocks was a management right, not subject to bargaining. Furthermore, WASA maintained that the new time clock system would not result in a substantial change in terms and conditions of employment.

In order to determine whether WASA's implementation of the new time clock system was a management right, and therefore not subject to bargaining, the Hearing Examiner relied on the provisions of D.C. Code § 1-617.08 (2001), "Management [R]ights",[13] and reviewed National Labor Relations Board (NLRB) case law cited by the

[13]This section of the Code provides that "all matters shall be deemed negotiable, except those that are proscribed by this subchapter" and lists the management rights which are not subject to collective bargaining. Among the rights reserved to management are: "the technology of performing its work" and "its internal security practices".

parties.[14] (See R&R at pgs. 14-15) The Hearing Examiner noted that in cases pertaining to management's installation of time clocks, the finding of a duty to bargain generally turns on whether implementation of the time clocks results in changes to working conditions that are significant and substantial in nature.[15] (See R&R at p. 14) The Hearing Examiner determined that, in the present case, WASA's installation of the electronic time clock system was not a substantial change from either the existing practice of the parties, or the provisions contained in the parties' collective bargaining agreement. This determination was based on her finding that Article 37, Section L of the collective bargaining agreement is "replete with provisions regarding work hours, lunch breaks and rest breaks". (R&R at p. 14) Also, Article 37, Section L provides for disciplinary action in the event of: "[t]he failure of an employee to follow the provisions of this subsection". (R&R pgs. 14-15) In addition, the Hearing Examiner relied on the statutory management rights provision of D.C. Code § 1-617.08(a)(5),[16] which mirrors the management rights clause in Article 4 of the collective bargaining agreement. In view of the above, the Hearing Examiner rejected the Unions' argument and found that no substantial change in terms and conditions of employment resulted from implementation of the electronic time clock system. Therefore, she concluded that WASA was not required to bargain over its decision to implement the new time clock system.

The Complainants also argued that the parties did not contemplate this type of technology when negotiating over management's right to implement new technology during negotiations for a successor agreement. However, the Hearing Examiner found that WASA was not prevented from implementing the electronic time clock system simply because this was not specifically discussed during contract negotiations concerning the definition of new technology. (See R&R at p. 16) Having concluded that by implementing the time clock system, WASA was exercising management's right to determine the technology of performing its work, the Hearing Examiner found that WASA did not violate the CMPA by refusing to bargain over its decision to implement the electronic time clock system. (See R&R pgs. 15-16)

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[14]The Hearing Examiner noted that in their closing briefs both parties cited *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 65 (1976) and *Bureau of National Affairs, Inc.*, 235 NLRB 8 (1978). In both of those cases, the employers had installed time clocks without bargaining with the Union. The NLRB inquired as to whether a timekeeping system had existed before the time clocks were installed and found that in both cases employees had previously been required to keep track of their time informally. Specifically, employees were required to punch in "on arrival at their workplace, on departure and return from lunch, and on departure from the workplace at the end of the workday." (*Bureau of National Affairs* at p. 3). As a result, the NLRB held that the employers in these cases did not commit an unfair labor practice by installing time clocks without bargaining because there was no significant or substantial change in the terms and conditions of employment. (*See Bureau of National Affairs*, at p. 10).

[15]See *Murphy Diesel Company*, 184 NLRB 757 (1970).

[16]D.C. Code § 1-617..08(a)(5) provides "[management] shall retain the sole right . . . to determine . . . the technology of performing its work." (R&R at p. 13)

The Complainants filed exceptions to the above findings. Specifically, the Complainants argue that the time clock system will: (1) result in substantial changes to the manner in which salaries are paid and (2) establish a new basis for disciplinary action. (See Exceptions at pgs. 2-3). The Complainants also assert that the parties did not contemplate this kind of technology (the electronic time clock system) when negotiating management's right to implement new technology. (See Exceptions at p. 3)

After reviewing the Complainants' exceptions, we find that the arguments contained in the exceptions are the same arguments considered and rejected by the Hearing Examiner. Thus, we believe that the Complainants are requesting that we adopt their interpretation of the evidence presented at the hearing. Furthermore, we conclude that their exceptions amount to a mere disagreement with the Hearing Examiner's findings. We have held that a mere disagreement with the Hearing Examiner's findings is not a basis for setting aside the Hearing Examiner's findings when they are fully supported by the record. See *American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works*, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Also, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee*, 47 DCR 796, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). In the present case, we find that the Hearing Examiner's findings are reasonable and fully supported by the record. As a result, we conclude that the Complainants' exceptions lack merit.

2. *Did WASA commit an unfair labor practice by refusing to engage in good faith impact and effects bargaining?*

"We have held that D.C. Code § 1-617.08(a) (2001 ed.)[17] exempts from the duty to bargain the decision to implement rights retained solely by management." *Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).[18] Furthermore, we have held that "the effects or impact of a non-bargainable management decision upon the terms and conditions of employment are bargainable *upon request.*"[19] (emphasis added) In view of the above, the Hearing Examiner determined that although WASA was exercising a management right, it was required to bargain over the impact and effects of

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[17]Prior codification at D.C. Code § 1-618.8(a) (1981 ed.)

[18]*Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990).

[19]*Teamsters, Local Unions No. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia General Hospital*, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992), and cases cited therein.

exercising this right, but only upon the request of the Unions. Once she made this determination, the Hearing Examiner focused on whether there was a request by the Unions to engage in impact and effects bargaining. The Hearing Examiner noted that:

> [T]he refusal to bargain alleged in the Complaint refers to the full bargaining requested by the Unions, not the impact or effects bargaining. [The testimony of the Unions' witness] supports WASA's position that WASA offered to bargain on impact and effects and that some bargaining took place. . . . [I]n response to the request by the Unions for bargaining over WASA's decision to implement the time clock system, WASA agreed to bargain only over "impact and effect[s]" . . . . [A]t the June 13, 2003 meeting, [the Unions] told [WASA that] they were entitled to engage in full bargaining over WASA's decision to implement the new system. . . . WASA stated that the Unions 'were limited' to impact and effects bargaining." (R&R at p. 18).

The Hearing Examiner further stated that "[t]here was no evidence presented that the Unions changed their position and agreed to engage in impact and effects bargaining. However, if [the Unions] did change their position . . . additional efforts should have been made." (R&R at p. 19) In light of the above, the Hearing Examiner concluded that "the Complainants did not meet the[ir] burden of proving that [WASA violated the CMPA] by refusing to engage in impact and effects bargaining, upon demand". (R&R at p. 20)

The Complainants took exception to the Hearing Examiner's: (1) "reasoning and conclusion [concerning their] allegation that WASA failed to engage in impact and effects bargaining" and (2) conclusion that "the Complainants did not meet their burden of proving that WASA violated the CMPA by failing to engage in impact and effects bargaining *because the Unions did not demand bargaining twice*". (Exceptions at p. 3) (emphasis added)[20]

With regard to the Complainants' first exception, the Hearing Examiner concluded that "[t]here was no evidence that WASA ever refused to engage in impact and effects bargaining." (R&R at p. 19) Therefore, we find that the Complainants are merely disagreeing with the Hearing Examiner's findings. With regard to the second exception, the Hearing Examiner found that WASA had no duty to bargain based on the Unions' written refusal to engage in impact and effects bargaining. Further, we believe that the Complainants are mis-characterizing the Hearing Examiner when she stated as follows: "*However, if [the Unions] did change their position . . . additional efforts should have been*

[20]In the statement cited, the Hearing Examiner addressed what the Unions should have done if they "changed their position and agreed to engage in impact and effects bargaining." (R&R at p. 19)

exercising this right, but only upon the request of the Unions. Once she made this determination, the Hearing Examiner focused on whether there was a request by the Unions to engage in impact and effects bargaining. The Hearing Examiner noted that:

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[20]In the statement cited, the Hearing Examiner addressed what the Unions should have done if they "changed their position and agreed to engage in impact and effects bargaining." (R&R at p. 19)

made." (R&R at p. 19) (emphasis added) Specifically, we believe that this statement addresses what the Unions should have done *if they changed their position* and agreed to engage in impact and effects bargaining.

After reviewing the exceptions, we conclude that the Unions are merely disagreeing with the Hearing Examiner's findings that they refused to engage in impact and effects bargaining. As noted above, we have found that a mere disagreement with the Hearing Examiner's findings is not a basis for setting aside those findings where, as here, they are fully supported by the record. Therefore, we find that this is not a sufficient basis for setting aside the findings of the Hearing Examiner.

Furthermore, we find that the Hearing Examiner's findings are reasonable, in keeping with Board precedent and fully supported by the record. Therefore, we adopt the Hearing Examiner's finding that the Unions did not meet the burden of proving that WASA failed to bargain over the impact and effects of implementing a management right. As a result, we conclude that WASA's actions did not violate the CMPA.

3. *Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of the new system while refusing to bargain with the Unions? Did WASA refuse to provide information?*

No exceptions were filed by the parties concerning the above issue. Nonetheless, we shall consider the Hearing Examiner's findings and conclusions.[21]

The Complainants alleged that WASA violated the CMPA by contacting employees directly while refusing to bargain with the Unions. (See Amended Complaint, at pgs. 3-4) However, the Hearing Examiner found no credible evidence that WASA unlawfully circumvented the Unions by informing its employees of the upcoming installation of time clocks. As a result, she concluded that WASA did not violate the CMPA. (See R&R at p. 20)

Where there is an allegation that an Employer has dealt directly with employees, the Board considers whether the Employer has "disparaged the union, [or] undermined the union to its members, or interfered or coerced its employees in the exercise of their right to bargain collectively". *AFSCME, Council 20 et al v. District of Columbia et al*, 36 DCR 427, Slip Op. No. 200 at p. 5, PERB Case No. 88-U-32 (1988). Absent such indications, communicating with employees concerning the status of negotiations is not a violation of the CMPA. In the present case, the Hearing Examiner found that WASA's May 27, 2003 letter did not disparage or undermine the Unions. Instead, the Hearing Examiner found that WASA just informed its employees when the time clock system was going into effect. We have reviewed the Hearing Examiner's finding concerning the May

[21]See *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 48 DCR 9551, Slip Op. No. 660, PERB Case No. 00-U-24 (2001), where we considered an issue that was not the subject of exceptions by the parties.

27 letter and find that it is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's finding and conclude that the Complainants did not establish that WASA circumvented the Unions by sending a letter to its employees. As a result, we find that WASA's actions do not violate the CMPA.

Finally, the Complainants alleged that WASA refused to provide information requested by the Unions that was necessary to their role as the exclusive bargaining agents. We have held that the failure to provide information that is relevant and necessary to a union's role as the exclusive bargaining agent is a violation of the CMPA.[22] In the present case, the Hearing Examiner found no evidence of WASA's alleged refusal to provide information. (R&R at p. 21) As a result, we believe that the Hearing Examiner's finding is reasonable, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings in this regard. As a result, we find no violation of the CMPA on this basis.

4. *Negotiability Appeal - PERB Case No. 03-N-04*

In their Appeal, the Complainants are seeking that the Board make a determination that the following two issues are negotiable: (1) the decision to implement the time clock system as opposed to using other methods, and (2) the decisions pertaining to the policies and procedures for implementation of time clocks. (See Appeal at p. 2).[23] In the Response, WASA countered that the Appeal was not timely and did not comply with Board rules. Therefore, WASA argued that the Appeal should be dismissed.

The Hearing Examiner found that the Appeal was timely filed. However, she concluded that:

> [the negotiability appeal] should be dismissed for several reasons. First, [she] concluded . . . that the subject of this negotiability appeal came within the definition of management rights and did not require bargaining before implementation. Alternatively, she concluded that the subject of this appeal involved new technology within the definition of the [collective bargaining agreement] and did not require bargaining before implementation. (R&R at p. 21)

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[22]See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, Slip Op. No. 835 at p. 9, PERB Case No. 06-U-10 (2006); see also, *Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health*, Slip Op. No. 809, PERB Case No. 04-U-41 (2005).

[23](This is not the specific language contained in the Unions' proposals. See footnote 5 for the specific language contained in the Unions' proposals dated May 20, 2003.)

In light of the above, the Hearing Examiner opined that the negotiability appeal should be dismissed because WASA was not required to engage in bargaining concerning its decision to implement time clocks. No exceptions were filed by the parties concerning the Hearing Examiner's conclusions.

For the reasons previously noted, we adopted the Hearing Examiner's findings that: (1) the issue of the time clock system was a management right and (2) WASA was not required to bargain over its decision to implement the time clock system. Consistent with these findings, we concur with the Hearing Examiner that the negotiability appeal should be dismissed because WASA was not required to bargain over its decision to implement the time clock system. Therefore, we adopt the Hearing Examiner's recommendation that the Appeal in PERB Case No. 03-N-04 be dismissed.

Pursuant to D.C. Code §1-605.02(3) and (5) (2001 ed.) and Board Rules 520.14 and 532, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive, supported by the record and consistent with Board precedent. Therefore, we adopt the Hearing Examiner's findings and conclusions concerning both the unfair labor practice and the negotiability appeal. As a result the unfair labor practice complaint in PERB Case No. 03-U-34 and the negotiability appeal in PERB Case No. 03-N-04 are dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint in PERB Case No. 03-U-34 is dismissed in its entirety.

2. The Negotiability appeal in PERB Case No. 03-N-04 is dismissed.

3. Pursuant to Board Rules 559.1, this Decision and Order is final upon issuance.

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

May 5, 2006

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 03-U-34 & 03-N-04 was transmitted via Fax and U.S. Mail to the following parties on this the 5th day of May 2006.

Melinda Holmes, Esq.
O'Donnell, Schwartz
& Anderson, P.C.
1300 L Street, N.W.
Suite 1200
Washington, D.C. 20005

FAX & U.S. MAIL

Kenneth Slaughter, Esq.
Venable, Baetjer, Howard
& Civiletti, LLP
575 7th Street, N.W.
Washington, D.C. 20004

FAX & U.S. MAIL

Courtesy Copies:

Brian Hudson, Esq.
Representative for DCHA
Venable, Baetjer, Howard
& Civiletti, LLP
575 7th Street, N.W.
Washington, D.C. 20004

U.S. MAIL

Lois Hochhauser, Hearing Examiner
1101 14th Street, N.W.
Suite 500
Washington, D.C. 2005

U.S. MAIL

Sheryl Harrington
Secretary

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BEFORE THE

PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCALS 631, 872, 2553, and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2091, and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-05-06 Complainants v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY Respondent	PERB Case No. 03-U-34 and PERB Case No. 03-N-04

Appearances:
For the Complainants: Melinda K. Holmes, Esq.
For the Respondent: Kenneth S. Slaughter, Esq.

REPORT AND RECOMMENDATION

I. Introduction

On May 8, 2003, the American Federation of Government Employees, Locals 631, 872, 2553 and American Federation of State, County and Municipal Employees, Local 2091 and National Association of Government Employees, Local R3-05-06 ("Unions" or "Complainants" herein) filed this Unfair Labor Practice Complaint with the District of Columbia Public Employee Relations Board (PERB) against the District of Columbia Water and Sewer Authority ("WASA" or "Respondent" herein) alleging that WASA had committed an unfair labor practice in violation of D.C. Code §1-617.04(a)(1) and (5) by refusing to "bargain over the implementation of new employee identification cards and new electronic time clocks...used for time and attendance". Unfair Labor Practice Complaint, p. 3. In its answer, filed on May 28, 2003, WASA denied that it had committed any unfair labor practice in this matter. Complainants amended the complaint on June 6, 2003, adding the allegation that WASA had dealt directly with employees in its letter of May 27, 2003 about the implementation of the new system while refusing to bargain with the Unions. WASA responded on June 24, 2003, denying the charges, and contending that Complainants had not exhausted their remedies

under the Master Agreement on Compensation and Working Conditions ("Master Agreement" herein).

Complainants next filed a motion for preliminary relief asking PERB to enjoin WASA from implementing the electronic time clocks until it bargained with the Unions. In its response, WASA sought dismissal of the motion, contending that the Unions had not filed a negotiability appeal and that WASA had never refused to bargain over the impact and effects of the new system. Subsequent pleadings were filed by the parties on this motion

On June 30, 2003, the Unions filed a Negotiability Appeal[1], arguing that WASA should have negotiated with the Unions about its decision to use time clocks and the policies and procedures before implementing its decision. Complainants contended that WASA had "unlawfully withheld information" needed by the Unions thereby impeding the Unions' ability to make substantive written proposals. (Negotiability Appeal, p. 3). In its Answer to the Unions' Negotiability Appeal, Respondent argued that PERB should dismiss the matter because it was not properly before the Board. Alternatively, it argued that its implementation of the new system was a management right and that WASA had never refused impact and effects bargaining.

The Board denied the Unions' motion for preliminary relief. In its Decision, issued September 30, 2003, the Board concluded that preliminary relief was not appropriate where, as in the instant matter, there were material facts in dispute. (Slip Op. 721, PERB Case No. 03-U-34). These matters were consolidated by the Executive Director on October 10, 2003.[2]

The prehearing conference took place on October 21, 2003. The proceeding took place on December 9 and December 10, 2003 at the PERB offices located at 717 14th Street, N.W. in the District of Columbia. The parties were given an opportunity to, and did in

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[1]This matter was assigned PERB Case No. 03-N-04.

[2]The unfair labor practice and negotiability complaints were consolidated. Complainants had filed a Notice of Impasse and Request for Impasse Resolution on May 29, 2003 contending that Respondent's failure to respond to the Unions' proposal should be deemed an impasse. (PERB Case No. 02-I-08). Respondent argued that it was premature to declare an impasse. However, the matter was withdrawn at the Unions' request on June 23, 2003.

fact, present documentary and testimonial evidence.[3] Melinda Holmes, Esq. represented Complainants. Kenneth Slaughter, Esq. and Brian Hudson, Esq. represented Respondent. In addition to the representatives, the following individuals were present on one or both hearing days: Olu Adebo, WASA Controller; Barry Carey, Local 2091 Vice President; Troy Coates, Local 631 Chief Shop Steward; Steven Cook, WASA Labor Relations Manager; Barbara Milton, Local 631 President; Delores Stevens, Local 2091 Recording Secretary; and Frank Walton, Local 2091 Treasurer/Chief Steward.

The parties elected to submit written closing arguments and did so on February 19, 2003.[4] The record was then closed.

II. **Issues**

A. Did WASA have a duty to engage in full bargaining with the Unions prior to the implementation of the new time keeping/data collection system or was its decision a "management right" requiring impact and effect bargaining?

B. Did WASA commit an unfair labor practice by refusing to engage in good faith impact and effects negotiations?

C. Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of new system while refusing to bargain with the Unions?

D. Did WASA refuse to negotiate about its decision to use time clocks to keep track of work time and it decision over the policies and procedures for implementing the time clocks?

III. **Laws, Rules and Regulations**

A. *Comprehensive Merit Personnel Act (CMPA)*

§1-618.4 Unfair Labor Practices *(in pertinent part only)*

(a) The District, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(5) Refusing to bargain collectively in good faith with the exclusive representative.

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[3]Exhibits are cited as "Ex" followed "J" if introduced jointly, "U" if introduced by Complainant Union or "R" if introduced by Respondent WASA; followed by the number of the exhibit. The transcript is cited as "Tr." followed by the page number(s).

[4]The time for filing briefs was extended twice at the request of the parties.

B. *Rules of the Public Employee Relations Board*

520.11 The purpose of hearings under this section is to develop a full and factual record upon which the Board may make a decision. 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. The procedures of Sections 550-557 of these rules shall apply to the hearing.

532.1 If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board. If the Board determines that an impasse has occurred regarding noncompensation matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed with the Board within five (5) days of the Board's determination as to the existence of an impasse. Except when otherwise ordered by the Board in its discretion, impasse proceedings shall not be suspended pending the Board's determination of a negotiability appeal.

532.3 Except as provided in Subsection 532.1 of these rules a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA. A response to the negotiability appeal may be filed within fifteen (15) days after the date of service of the appeal.

C. *Master Agreement on Compensation and Working Conditions* (October 4, 2001) (Ex. J-1)

Part II: Working Conditions

Article 2: RELATIONSHIP OF THIS AGREEMENT TO AUTHORITY POLICIES AND PRACTICES

In exercising authority to establish regulations relating to the Authority's policies in matters affecting working conditions of employees covered by this Agreement, the Authority shall have due regard for the obligations set forth in this Agreement.

If any policy or regulation of the Authority is in conflict with a provision of this Agreement, the Agreement shall prevail.

No authority regulations on a negotiable issue is to be adopted or changed without first taking into consideration the

Local Unions' point of view or allowing the Local Unions an opportunity to offer suggestions or alternatives.

Article 4: MANAGEMENT RIGHTS *(in pertinent part only)*
Section A: General
D.C. Code Section 1-618.8 of the CMPA establishes management's rights as follows:

1. The Authority shall retain the sole right, in accordance with applicable laws and rules and regulations:
   a. To direct employees of the Authority;
   b. To hire, promote, transfer, assign and retain employees in positions within the Authority and to suspend, demote, discharge or take other disciplinary action against employees for cause;
   c. To relieve employees of duties because of lack of work or other legitimate reasons;
   d. To maintain the efficiency of the Authority operations entrusted to them;
   e. To determine the mission of the Authority, its budget, its operations, the number of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work, or its internal security practices; and
   f. To take whatever action may be necessary to carry out the mission of the Authority in emergency situations.

2. All matters shall be deemed negotiable except those that are proscribed by the CMPA...

Section B. Impact of the Exercise of Management's Rights and Bargaining over Negotiable Issues

1. Management rights are not subject to negotiations. In accordance with D.C. law, the Authority shall bargain with the Local Unions over the impact and effect of its exercise of enumerated Management rights. In addition, the Authority shall bargain over subjects that have otherwise been deemed negotiable under the D.C. law.

2. The Authority shall give the President of each Local Union advance written notice of changes in personnel policies, practices, or working conditions affecting employees covered by this Agreement. The Local Unions shall have the opportunity to exercise their full rights to bargain.

Article 33: NEW TECHNOLOGY *(in pertinent part only)*
Section A - Definition: New technology shall mean the acquisition, introduction, and implementation of new equipment, systems, methods and procedures that have not previously been used

by the Authority to modify, update or improve existing Authority processes by a substantial measure.

Section B - Union Notification Requirements: The Authority shall consult with the appropriate Local Union(s) at least sixty (60) calendar days prior to the acquisition or implementation of any new technology that may adversely impact employees. No less than forty-five (45) calendar days prior to the implementation of such equipment or system, the Authority shall provide written notice to the appropriate Local Union(s) that shall include the following:

1. The Authority's description of the new technology or system and the timing for implementation.
2. The Authority's assessment of the impact on covered employees.
3. The Authority's assessment of whether training shall be required for employees affected by the implementation. If training is required, the notice shall describe the training opportunities that the Authority shall provide at its expense.
4. The Authority's assessment of the economic impact of the implementation on the Authority's operations.

The appropriate Local Union(s) shall be provided with the opportunity to exercise its full rights to bargain under Part II, Article 4, Section B, Management Rights, following consultation and notice of the introduction of new technology. However, such bargaining shall not delay the implementation of the new technology.

IV. Summary of Proceedings and Undisputed Facts

Complainants, American Federation of Government Employees (AFGE), Locals 631, 872, 2553; American Federation of State, County and Municipal Employees (AFSCME), Local 2091; and National Association of Government Employees (NAGE), Local R3-05-06 are the exclusive bargaining representatives of bargaining unit employees of WASA, and are parties to the Master Agreement on Compensation and Working Conditions (Ex J-1). Collectively, they have been certified by PERB as Compensation Unit 31.[5]

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[5]AFGE, Local 631, represents approximately 200 bargaining unit employees in Engineering and Technical Services, Waste Water Treatment and Procurement. AFGE, Local 872, represents about 190 employees in Water Services and Water Management and Billing. AFGE, Local 2553, represents about 59 Sewer Services employees. AFSCME, Local 2091, represents approximately 340 employees working in Sewer Services, Maintenance Services, Materiel Management and Facilities and Security. NAGE, Local R3-06, represents about 22 employees in Budget and Finance. (Tr, pp. 33-34).

WASA is responsible with providing potable water and sewage collection to the District of Columbia metropolitan area. It employs more than 800 individuals. In 1999, WASA was removed from the District of Columbia payroll system and the following year, it established its own payroll and personnel system which replaces the manual system previously used to record time and attendance. In 2001, it developed a computerized time and attendance system. It is "an integrated system that requires an identification device [and] has a data collection terminal that collects...data with respect to time and attendance". (Tr, p. 102). The new system utilizes identification badges also known as facility access cards (FAC), that are "swiped" by employees at data collection terminals. Employees swipe their cards through one of the data collection terminals before and after their tours-of-duty and lunch periods. The data collection terminals, placed at various locations, automatically record time and attendance each time they are swiped. There is also a security component. The card has the Employee's picture, which serves as an identification badge, and also controls access into certain areas. (Tr, p. 103). The system is agency-wide and affects bargaining unit employees as well as non-union employees.

In the Unfair Labor Practice Complaint, the Unions contend that "Respondent has refused to bargain over the implementation of new employee identifications cards and new electronic time clocks that will be used for time and attendance". Complainants maintain that they sought to bargain on at least two occasions, but were rebuffed by Respondent. In the amended complaint, they add the allegation that WASA dealt directly with employees about the implementation of new badges and time clocks while refusing to bargain" with the Unions.

The Unions contend that the new system is not merely new technology, but rather is "part of an overall program that has materially changed pay and leave policies and created a new basis for discipline that had not previously existed". (Tr, p. 13). Therefore, they contend that implementation is a mandatory subject of bargaining, requiring WASA to give the unions advance notice and a meaningful opportunity to bargain before implementation. As relief, Complainants seek a return to the *status quo* and the opportunity to engage in meaningful negotiations.

Barbara Milton, Local 631 President, testified that the data collection terminals and electronic time clocks were discussed at the November 2002 labor-management meeting and a presentation was made. After that meeting, the Union presidents wrote to Mr. Cook asking to bargain and asking for information. (Tr, pp. 262-264, Ex. J-2A). The witness recalled that there were no labor-management meetings in December 2002 and January 2003, and that at the

February 2003 meeting, when the Union presidents asked Mr. Cook why he had not responded to their letter, and he informed them that he had. She had not received the letter, and obtained a copy after the February meeting. (Tr, pp. 266-268, Ex. J-2B). Ms. Milton testified that the Unions responded to the letter by asking his availability to bargain. She stated that the Unions raised the matter again at the May meeting. (Tr, p. 269).

Ms. Milton testified she received Mr. Cook's May 14 response shortly after the unfair labor practice complaint was filed. (Tr, p. 270, Ex. J-2E). She stated that the letter contained WASA's first offer to bargain, but that WASA wanted proposals from the Unions first. Complainants contend that since the purpose of time clocks is to keep track of time for the purpose of compensation and benefits, it "is itself a working condition and is therefore negotiable". (Negotiability Appeal, p. 2). Ms. Milton stated the Unions could not make written proposals about the time clocks because it lacked information since the Unions did not know all of the issues and aspects of the changes. She claimed that the Unions were given "teeny bits and bites" of information causing "a lot of frustration". (Tr, pp. 300-301). WASA did not provide answers to the questions raised by the Unions in its June 10 letter, but rather invited Complainants to attend a meeting on June 13. (Tr, pp. 270-272, Exs 2E, 2G).

WASA's General Manager notified WASA employees about the implementation of the new system by letter dated May 27, 2003. (Tr, p. 37, Ex U-2). According to the witness, the new time clocks were implemented on or about August 9, 2003. (Tr, p. 48).

The witness testified she participated in negotiating the recent Master Agreement, and that these matters were not raised while the parties were in negotiations, particularly when "new technology" as contemplated in Articles 4 and 33 was discussed. (Tr, pp. 58-59, Ex J-1).

The Unions contend that the new system has changed practices related to leave. Ms. Milton testified that employees now take leave in fifteen minute increments, whereas before employees were paid on an hourly basis for regular time, an employee reporting 15 minutes late would have to take leave for a full hour. ((Tr, pp. 43, 67, Ex U-3). Another change, according to the witness, is that employees are now permitted to "swipe in" only fifteen minutes before their tours-of-duty whereas before they could sign in whenever they got to work. (Tr, pp. 44-45, Exs U-3, U-4). She pointed to a memorandum from the supervisor of the solids processing section telling employees that now that they were trained on the new system, they had to swipe in no earlier than 15

minutes before the tour-of duty and no later than seven minutes after the end, because to do otherwise would result in unauthorized overtime. The memorandum stated that employees would be subject to disciplinary actions if the problem became "repetitive". (Ex U-4). She testified that employees were not receiving correct pay since the new system was installed and stated that the handwritten method was more accurate. She noted that a grievance regarding the accuracy of the time clock. (Tr, pp. 278-286, Ex U-8).

Ms. Milton stated that the Unions sought to bargain over WASA's decision to implement the new system. The witness testified that the Unions sought to have the issue of WASA's refusal to bargain on these matters at the February 18, 2003 and May 20, 2003 labor-management meetings. (Ex U-7). She stated that there was no discussion of electronic time clocks at any labor-management partnership meeting. (Tr, pp. 274-275). Ms. Milton testified that at one point she offered dates to Mr. Cook, by indicating that the Unions could bargain the next week, but that he responded that WASA was not yet ready to bargain. (Tr, p. 306). The witness stated that in response to the Unions' efforts to engage in full bargaining, WASA stated it would bargain only over "impact and effect". (Tr, p. 46). Ms. Milton testified that there were two meetings on these issues. At the second meeting, on or about June 13, 2003, the Unions told management they were entitled to engage in full bargaining over WASA's decision to implement the policy. (Tr, p. 47). Ms. Milton added there was one additional meeting that she had not attended. (Tr, p. 50).

Ms. Milton testified that identification (ID) badges were not new to employees, but that prior to the new system, the ID badges did not interface with the payroll system and did not control access. The witness stated that the Unions did not disagree that access to the facility was a security issue and reserved as a management right, but that the Unions were concerned with the timekeeping aspect. (Tr, p. 304).

WASA contends that the new system is "truly a kind of new technology contemplated by the parties in their contract as a management right". (Tr, p. 17). It maintains that the new system improves and updates existing procedures for tracking time and attendance. Implementation of the system, WASA argues, does not change any term or condition of employment. (Tr, pp. 19-20). Respondent estimates that more than 300,000 time sheets were processed manually, and each time sheet had to be entered manually by a timekeeper. That is no longer required. WASA contends that the new system reduces the likelihood of error and saves significant time and resources.

WASA alleges that it met its obligation by offering to bargain over the impact and effects of the new system, but that the Unions rejected its offer. Despite the formal rejection, WASA contends it communicated with the Unions and implemented many of the changes suggested by the Unions. (Tr, pp. 136-139). Respondent claims the negotiability appeal should be dismissed because "there is no issue of negotiability before the Board" since the WASA "never communicated in writing that it considered the specific proposal to be nonnegotiable". (*Id*). Alternatively, it argues that the negotiability appeal should be dismissed as untimely.

WASA contends that it kept Union leadership fully informed throughout the process of developing and implementing the new system, and further that it met its legal obligation by offering to engage in impact and effects bargaining. Members of its task force, headed by Controller Olu Adebo, met with Union leadership formally and informally although no Union leaders were on the task force. Stephen Cook, Manager of Labor Relations, stated he was appointed to the task force because WASA knew it had to "inform and educate employees and...union leadership regarding what we were doing, why we were doing it, how we were doing it. So it was an integral part of the planning process, to educate and inform". (Tr, p. 113). Mr. Cook testified that Union leaders were first given information at a labor management meeting in approximately October 2002 which was attended by the five Union presidents. He said members of the task force involved in payroll and security participated in that meeting. (Tr, pp. 114-115). WASA also provided formal written information and responses as well as informal communications. (Tr, pp. 118-122, Exs J-2, A-1).

Mr. Cook testified that WASA was prepared to engage in bargaining over the impact and effects of the new system, but that the Unions declined its offer. (Tr, p. 193). He stated that management was prepared to enter into impact and effects bargaining at the June meeting, but that the unions stated they wanted to engage in full bargaining:

> We got to the meeting...they were saying, "well, we're not here to impact and effects negotiations, we believe that this is..." I think they used the term full bargaining... (Tr, p. 134).

The witness stated that the individuals attending the meeting on behalf of WASA did not leave the meeting, but rather remained and entered into a discussion with Union leaders, including Ms. Milton, on various issues. Mr. Cook testified that he considered the meetings in June and August with Union leadership to be bargaining. (Tr, p. 168). He testified that management responded to all of the

questions raised by Union leaders, and that "there was a back and forth dialogue and questions and answers". (Tr, p. 173).

Mr. Cook testified that the new system does not change what is required of employees, i.e., that they report to work on time and that they report their time accurately. (Tr, p. 125). Managers had and continue to have discretion to excuse tardiness. (Tr, p. 126).

With regard to new technology, Mr. Cook that WASA complied with all notification requirements imposed where there is no adverse impact anticipated. (Tr, pp. 187-189, Ex J-2D).

Olu Adebo testified that he has been WASA Controller for approximately two years. He is the WASA official responsible for implementing the data collection system project. He explained that the data collection system is maintained under payroll because it is a "key tool" for gathering timekeeping information. It is also integrated with the security system. Mr. Adebo stated that in addition to saving work hours for employees who were involved in timekeeping when it was on paper, the new system has also reduced the amount of time needed by the employee to fill out time sheets. The witness testified that the new system is more accurate than the manual paper one.

According to Mr. Adebo, several task forces were created in approximately January 2003 to deal with the transition to the new system. (Tr, p. 220). The steering committee consisted of the Mr. Adebo and the directors of the human resources (HR) and information technology (IT) departments. The people responsible for putting the infrastructure together were part of the task force. There was a functional task force with payroll and HR staff, individuals who understand the "intricacies of the different setups". (Tr, p. 219). There was a communication team "charged with making sure that the message that was delivered was consistent and accurate...to all employees and every end user". (*Id*). Finally, there was a team, made up of project team members who got employees involved in setting up some of the procedures. (*Id*).

Mr. Adebo testified that he first communicated with bargaining unit employees in October or November 2002 when he brought a new time clock to a meeting organized by Mr. Cook which was attended by all the Union presidents and some senior managers. Mr. Adebo stated that copies of a schematic diagram of how the system would operate were distributed. (Tr, p. 220, Ex A-1). After this meeting, the witness stated, the parties met "practically every month" at labor-management and/or labor-management partnership meetings. (Tr, pp. 223, 243-244). He stated that he participated

in WASA's responses to the Unions on January 30, 2003 and May 14, 2003.(Tr, p. 225, Ex J-2B and D). Mr. Adebo testified that the data collection terminals were discussed at every labor-management and partnership meeting he attended during this period. (Tr, p. 246).

The witness testified that the Unions had "input" in this process. (Tr, p. 229). He stated that in addition to the meetings and letters, there was "a lot of informal contacts, literally hallway contacts, telephone". (Tr, p. 226). He noted that the Communication Team tried to "manage the communication [to] make sure that the message was consistent". (Tr, p. 227). Mr. Adebo stated that he spoke with "every single union president" about their concerns and/or questions regarding the data collection terminals. (Tr, p. 228).

According to Mr. Adebo, "rounding off" was implemented because management agreed with the Unions that employees could not all clock-in or clock-out at the prescribed time, but might have to wait on line for several minutes. The witness stated he addressed the issue of "rounding off" at meetings, formal and informal. He stated that the issue was difficult because in addition to start and end time, employees take lunch and other breaks. He testified that at the August 8 meeting with the Union presidents the "overwhelming preference" was to go with the wider range, i.e., 15 minutes. (Tr, pp. 232-233). Also, due to the recommendations from the Union presidents and the task force, the number of time clocks was increased and additional locations were added. (Tr, p. 235). He noted that if an employee forgets to swipe, the former procedure will be used, i.e., use of manual entry. Mr. Adebo testified that authorization of overtime has not changed.

Mr. Adebo stated he attended a Steering Committee meeting with Union presidents. He did not remember the date, but recalled that Mr. Cook had told him

> we had to bargain or something, that we went into bargain, and the union said they were not here to bargain or something, that they had a court case. So we sat through and went through about a couple of hours...And so we went through and did a back and forth answering their questions. (Tr, p. 250).

V. **Analysis, Findings and Conclusions**

At issue in these consolidated matters is the obligation, if any, WASA was required to satisfy prior to implementing the new system with its attendant timekeeping, attendance, identification and security components. The Unions claim full bargaining was required. WASA argues full bargaining was not required because

implementation of this system was within its management rights. If full bargaining was required, then WASA committed an unfair labor practice, because it agrees it did not undertake full bargaining before implementation. If full bargaining was not required, the inquiry must proceed to the next issue, i.e., did WASA commit an unfair labor practice by failing to engage in impact and effects bargaining. Complainants contend WASA did not engage in such bargaining although it was requested by the Unions, while Respondent maintains that even though the Unions refused to engage in impact and effects bargaining, such bargaining took place. The issue before PERB in the negotiability complaint is whether WASA refused to negotiate on the issues of the new system during negotiations. The Unions contend WASA refused, a charge that WASA denies.

A. *Did WASA have a duty to bargain with Unions prior to the implementation of the new time system or was the decision a "management right" requiring impact and effects bargaining?*

Management rights are those responsibilities reserved to an employer, which exempt it from the duty it would otherwise have to engage in full bargaining before implementation. Article 4 of the Master Agreement which incorporates D.C. Code Section 1-618.8, provides a general definition of management rights. Of relevance here, are the provisions which give WASA the authority:

a. To direct employees of the Authority;
d. To maintain the efficiency of the Authority operations entrusted to them;
e. To determine the mission of the Authority, its budget, its operations, the number of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work, or its internal security practices; and
f. To take whatever action may be necessary to carry out the mission of the Authority in emergency situations.

The Unions argue that with the exception of the security component of the new system, which they agree is a management right, Respondent was obligated to bargain before implementing the new system because it was a significant change from the prior procedures and changed the terms and conditions of employment. Complainants point to "rounding off" and the requirement that employees clock in or out within a specified time or risk disciplinary action as new practices. WASA, on the other hand, contends that the system comes within the definition of its management rights and does not represent a major change, that it is an improvement of the old system, and that it

The National Labor Relations Board (NLRB) has looked at a number of cases involving changes to timekeeping systems. It has made no broad sweeping standards, but rather has examined each case on its merits. The cases turn on whether the changes were significant and substantial. *See, Murphy Diesel Company,* 184 NLRB 757 (1970). Both parties in this proceeding have cited *Rust Craft Broadcasting of New York, Inc.* 225 NLRB 65 (1976) and *Bureau of National Affairs, Inc.* 235 NLRB 8 (1978) in their closing briefs, so the Hearing Examiner examined both decisions carefully and with particular interest. Unions' Post-Hearing Brief, p. 14; Post-Hearing Brief of the District of Columbia Water and Sewer Authority, p. 23.

In both *Rust Craft* and *Bureau of National Affairs,* the employers had instituted time clocks without bargaining with the Unions. The Board started its inquiry in both cases with whether a timekeeping system had existed before the time clocks were installed. In both cases, employees had been required to keep track of their time, *albeit* more informally. The Board concluded that the employers in these cases did not commit an unfair labor practice by "initiating a more dependable method of enforcing its longstanding rule that employees record their time". 225 NLRB No. 65, p. 327. The Board stated that an employer was "free to choose the more efficient and dependable methods for enforcing its workplace rules", and that under the circumstances presented, "introduction of the time clocks was but a part of the day-to-day managerial control which it was free to exercise". On the other hand, in cases in which employees had not previously been required to keep track of their time, the Board concluded the change was significant and the employer had committed an unfair labor practice by installing a time clock without bargaining with the union. *Nathan Littauer Hospital Association,* 229 NLRB 1122 (1977).

In the instant matter, it is undisputed that WASA employees have always been required to keep track of their time. The testimony at the proceeding was that timekeeping and attendance were previously maintained manually. The Master Agreement serves as the appropriate starting point. It is replete with provisions regarding work hours, lunch breaks, rest breaks, etc.. Section L of Article 37 provides that:

> Employees are required to work at the scheduled starting time and return from breaks or meal period on time.

The Master Agreement does not require that specific methods to be used by employees to record time, only that accurate timekeeping be maintained. The Master Agreement is also silent on "rounding off" or disciplining employees who sign in early. But in

addition to requiring accuracy of reporting, it also provides for managerial discretion:

> Occasionally, unavoidable circumstances may cause an employee to be late. Unavoidable tardiness from duty of less than one (1) hour, for a bona fide reason, may be excused without charge to annual leave, sick leave or leave without pay, at the discretion of the immediate supervisor. *See,* Section L of Article 37.

Using the *Rust Craft* and *Bureau of National Affairs,* the Hearing Examiner concludes that Complainants did not establish that the new system constituted a significant change. Employees have always been required to keep records of their time and attendance. They have always been required to report to work on time and to take their breaks at specific times. The new system is a more dependable and technologically advanced method of achieving these goals, even if there have been glitches in the system which has resulted in one or more grievance having been filed. There is no requirement that the new system be error-proof. In addition, WASA presented evidence that supervisors would retain the discretion to excuse lateness and that if necessary, an employee could use the manual method of record keeping.

With regard to the argument that discipline may now be imposed if an employee clocks in or out outside of the parameters noted above, the Hearing Examiner points out that Section L of Article 37 concludes that "[t]he failure of an employee to follow the provisions of this subsection may result in disciplinary action". The provision relates to reporting to work at the scheduled time. Thus, employees who did not report at the scheduled time were always subject to discipline. As noted above, however, the new system, consistent with the Master Agreement, also provides for managerial discretion in this area.

Alternatively, WASA argues that the new system comes within the definition of "new technology" contained in Section A of Article 33 of the Master Agreement which defines new technology as "the acquisition, introduction, and implementation of new equipment, systems, methods and procedures that have not previously been used by the Authority to modify, update or improve existing Authority processes by a substantial measure." The Master Agreement requires WASA to consult with the affected Union at least 60 calendar days prior to the acquisition or implementation of any new technology that may adversely impact employees. WASA must also provide written notice to the Union with specific information at least 45 calendar days prior to the implementation of such equipment or system. The Master Agreement,

Article 33, Section B, provides that while the Unions have "the opportunity to exercise its full rights to bargain under Part II, Article 4, Section B, Management Rights, following consultation and notice of the introduction of new technology...such bargaining shall not delay the implementation of the new technology." *See*, Ex J-1, *supra*. The Unions does not argue that WASA failed to provide the required notification, but rather that WASA did not mention the new system when the parties were in contract negotiations. However, WASA is not barred from introducing new technology because it was not discussed at the time the contract was negotiated. The new system comes within the definition of the Master Agreement, i.e., it is a new system that was not previously been used which is designed to substantially improve existing procedures. *See* Article 33, Section A. Therefore, pursuant to Article 33, WASA was not required to delay implementation pending full bargaining, but was required to engage in impact and effects bargaining, upon request.

In sum, the Hearing Examiner concludes WASA did not commit an unfair labor practice by implementing the new system since it was exercising a reserved management right. *Teamsters, Local Unions No. 639 and 730 v. District of Columbia Public Schools*, PERB Case No. 89-U-17, Opinion 249 (November 1, 1990). She further concludes that the new system constitutes "new technology" consistent with the definition in the Master Agreement and that pursuant to Article 33 of the Master Agreement, WASA was not required to engage in full bargaining prior to implementation.

B. Did WASA commit an unfair labor practice by refusing to engage in impact and effects bargaining?

As noted above, the inquiry does not stop with the finding that WASA acted within its management rights, since the Union also contends that management refused to engage in impact and effects bargaining. WASA contends that it did not refuse to engage in impact and effects bargaining. Rather it contends that even though Unions declined to engage in impact and effects bargaining maintaining that full bargaining was required, impact and effects bargaining did take place.

Article 4 Section B(1) of the Master Agreement requires WASA to bargain with the Unions "over the impact and effect of its exercise of enumerated Management rights". WASA was required to give each Union President "advance written notice of changes in personnel policies, practices, or working conditions affecting employees covered by this Agreement." *See* Ex J-1, *supra*. The Unions do not dispute that they were given written notice, but contend that WASA did not engage in good faith bargaining.

This Board has long held that "the effects or impact of a non-bargainable management decision upon the terms and conditions of employment are bargainable upon request." *University of the District of Columbia Faculty Association v. University of the District of Columbia*, PERB Case No. 82-N-01, Opinion 43 (November 1, 1990). The violation of the duty to bargain is based not on the unilateral implementation of a management right decision, but rather on the employer's failure to bargain over the impact and effect of such a decision once the request to bargain has been made. *See, e.g., American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, PERB Case No. 94-U-09, Op. 418 (March 29, 1995).

In determining if an employer has committed an unfair labor practice, the NLRB looks at whether an employer has demonstrated "good faith". *NLRB v. Alva Allen Industries, Inc.* 369 F.2d 210 (8th Cir.). Good faith bargaining requires timely notice and a meaningful opportunity to bargain about the effects of a management decision prior to implementation. *International Ladies Garment Workers Union v. NLRB*, 446 F.2d 907, 919 (D.C. Cir 1972). This inquiry is made on a case-by-case basis.

There was considerable testimony at the hearing about meetings with Union officials where the new system was discussed and demonstrated. There was also testimony from both Mr. Cook and Mr. Adebo about informal conversations and meetings with Union officials. WASA asserted that a number of the suggestions from Union officials were implemented by management. However, these informal meetings and conversations between WASA management and Union officials where management received "input" from Unions are insufficient "to fulfill the duty to bargain over the impact of its management right". *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, PERB Case No. 99-U-44, Op. 607 (November 19, 1999). Similarly, in *International Brotherhood of Police Officers v. D.C. General Hospital*, 39 DCR 9633, Op. 322 (November 19, 1995), the Board concluded that affording a Union with "the opportunity to provide input" prior to implementing a management decision constitutes a refusal to bargain in good faith, on request, over the impact and effects of a managerial decision.

Meetings alone are not sufficient to satisfy the obligation to bargain. The meeting must consist of bargaining, i.e., a meaningful exchange between the parties. *AFSCME, et al. v. University of the District of Columbia, et al.*, PERB Case No. 92-U-24, Op. 343, 43 DCR 1148 (1993). In *American Federation of Government Employees, Local Union No. 2725, AFL-CIO v. Department of Public and Assisted Housing*, PERB Case No. 92-U-21, Op. 404

(October 12, 1994) the Board agreed with the Hearing Examiner's conclusion that "by merely consulting with [the union] over the impact and effects of the realignment, [the agency] did not satisfy its statutory obligation under the CMPA and thereby violated D.C. Code Sec. 1-618.4(a)(1)(5).

WASA contends that it agreed to, and did in fact, engage in impact and effects bargaining despite the Unions' insistence on full bargaining at the June meeting. He testified that management and the Union leadership, engaged in meaningful discussions that resulted in implementing some changes suggested by the Unions. WASA considered this meeting and the one in August to have been impact and effects bargaining. (Tr, pp. 47, 168). Although Mr. Adebo did not recall the date of the meeting, he too testified that management and Union leaders stayed for several hours and discussed the issues after the Unions rejected WASA's offer to engage in impact and effects bargaining. (Tr, p. 250).

The refusal to bargain alleged in the Complaint refers to the full bargaining requested by the Unions, not the impact or effects bargaining. Ms. Milton's testimony supports WASA's position that WASA offered to bargain on impact and effects and that some bargaining took place. Ms. Milton testified that in response to the request by the Unions for bargaining over WASA's decision to implement the time clock system, WASA agreed to bargain only over "impact and effect". (Unfair Labor Practice Complaint, p. 4, Tr, p. 46). She stated that at the June 13, 2003 meeting, Complainants told Respondent they were entitled to engage in full bargaining over WASA's decision to implement the new system. She testified WASA stated that the Unions "were limited" to impact and effects bargaining. (Tr, p. 47). Similarly, in their Negotiability Appeal, Complainants state:

> By letter dated June 9, 2003...WASA noted its willingness to engage in impact and effects bargaining over the time clocks. The Union-Petitioners responded by letter dated June 10, 2003...reiterating their position that WASA negotiate over the decision to use the time clocks. (Negotiability Appeal, p. 4).

Mr. Cook's letter of June 9 inviting the Unions to meet to discuss their proposals, was not limited to time clocks. Indeed the subject of the letter was "Request for Impact and Effects Bargaining Concerning Automated Time and Attendance Data Collection". (Ex J-2F). The response by the Unions dated June 10, states that:

> the Unions did not request to bargain over impact and effect...we ask to engage in full bargaining. We

> believe that this is a mandatory subject of bargaining that effects the terms and conditions of employment for employees we represent. (Ex J-2G).

Mr. Cook's June 13 letter confirms that, at least in WASA's view, the June meeting was "over the impact and effects of the Authority's implementation of the Automated Time and Attendance System". (Ex J-2H). Mr. Cook noted in the letter that the Unions had taken the position that they "have not requested, nor do they intend to request, impact and effects bargaining". The Unions' June 16 reply states:

> The Authority has been informed since November 26, 2002 that the Unions consider the matter of time clocks used for time and attendance, an issue that is a mandatory subject of bargaining, not impact and effect".

Further support for the position that the Unions considered the matters to be subject to mandatory bargaining, is its May 20, 2003 letter to Mr. Cook stating

> Although you may consider the clocks new technology, we consider it as a change in the methods of keeping time and attendance and a mandatory subject of bargaining under the law. (Ex J-2E).

There was no evidence presented that the Unions changed their position and agreed to engage in impact and effects bargaining. However, if Complainants did change their position, or if they felt the June session was not sufficient impact and effects bargaining, even if they did not change their position, given their earlier position, additional efforts should have been made. There was no evidence that WASA ever refused to engage in impact and effects bargaining. But PERB has stated that when there is a negative response, another effort be made by the Union. That guidance is particularly useful in this case where Complainants were demanding full bargaining and Respondent was offering impact and effects bargaining. The Board stated:

> the better approach, upon being faced with an effective refusal to bargain over any aspect of a management decision, is to then make a second request to bargain with respect to the specific effects and impact of that management decision on bargaining unit employees' terms and conditions of employment. *International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital*, PERB Case No. 91-U-14, Op. 322 (July 15, 1992).

Based on these findings, the Hearing Examiner concludes that Complainants did not meet their burden of proving that Respondent engaged in an unfair labor practice by refusing to engage in impact and effects bargaining, upon demand.

3. Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of new employee identification card badges and new electronic time clocks while refusing to bargain with the Unions?

The amended Complaint alleges that WASA notified the Unions it was going to implement an electronic time clock at a labor-management meeting in October 8, 2002, and that WASA also told Complainants of its plan to utilize the new identification badges which would "interface with the new electronic time clocks and be used for time and attendance. Amended Unfair Labor Practice Complaint, pp. 3-4. WASA employees were notified by letter from WASA's General Manager Jerry N. Johnson dated May 23, 2003 that WASA would be implementing the automated time and attendance program which replaced the manual program. (Ex U-2). The new system was used on or about August 9, 2003. (Tr, p. 47).

Complainants contend that WASA committed an unfair labor practice by contacting employees directly while refusing to bargain with the Unions. WASA agrees that it met with employees about the new system, and does not dispute that it sent employees the May 23 letter. However, given the conclusion that WASA did not refuse to engage in impact and effects bargaining, the Hearing Examiner concludes that Complainants did not meet their burden that WASA circumvented the Unions in this matter.

D. Did WASA refuse to negotiate about its decision to use time clocks to keep track of work time and it decision over the policies and procedures for implementing the time clocks?

In their negotiability appeal filed on June 30, 2003, Complainants seek PERB's determination that the issue of the decision to use time clocks and the decision over the policies and procedures for its utilization are negotiable. Negotiability Appeal, p. 2. The Unions contend that they did not advance substantive proposals because "WASA has unlawfully withheld information". (*Id*, p. 3). Finally, Complainants argue that the appeal is timely because "WASA has not expressed its position that the time clocks are non-negotiable in writing". (*Id*).

WASA contends that the matter is not ripe since Complainants concede that they did not make any proposals. Answer to the Unions' Negotiability Appeal, p. 3. Alternatively, it argues that its implementation of the new system was a management right and

that WASA had never refused impact and effects bargaining. Alternatively, WASA points to two proposals made in Complainants' May 20 letter, and contends that it never responded that the proposals were nonnegotiable. (*Id*, p. 4).

PERB rules require that in order for a negotiability appeal to be ripe, a declaration of nonnegotiability must be made in the context of collective bargaining. *Teamsters Local Unions No. 639, 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, PERB Case No. 90-N-01, Op. 299 (1992). Although Board Rules do not impose a time limit within which management must declare nonnegotiability, PERB requires that the declaration be made before the termination of bargaining. *Teamsters Local Unions No. 639, 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, PERB Case No. 94-N-06, Op. 4039 (September 19, 1994).

The Hearing Examiner does not find that the matter was untimely filed in that Mr. Cook's letter of June 9, 2003 was captioned "impact and effects", thus clearly rejecting the Unions' efforts for full bargaining. The appeal was filed on June 30, within the requisite time frame. However, she concludes that this matter should be dismissed for several reasons. First, the Hearing Examiner concluded, for the reasons stated above, that the subject of this negotiability appeal came within the definition of management rights and did not require bargaining before implementation. Alternatively, she concluded that the subject of this appeal involved new technology within the definition of the Master Agreement, and did not require bargaining before implementation. In addition, the Hearing Examiner found that WASA provided the Unions with information about the new system prior to implementation. The information was provided at meetings and in communications. (See, e.g., Ex. J-2, and pp. 11-13, *infra*). Complainants did not meet their burden that information was unlawfully withheld from them by WASA.

VI. **Conclusion and Recommendation**

Based on the documentary and testimonial evidence as well as the discussion presented herein, the Hearing Examiner recommends that both of these matters be dismissed.

Respectfully submitted,

Lois Hochhauser

Lois Hochhauser, Esq.
Hearing Examiner

March 18, 2004

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BEFORE THE

PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCALS 631, 872, 2553, and AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2091, and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R3-05-06 Complainants v. DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY Respondent	PERB Case No. 03-U-34 and PERB Case No. 03-N-04

Appearances:
For the Complainants: Melinda K. Holmes, Esq.
For the Respondent: Kenneth S. Slaughter, Esq.

REPORT AND RECOMMENDATION

I. Introduction

On May 8, 2003, the American Federation of Government Employees, Locals 631, 872, 2553 and American Federation of State, County and Municipal Employees, Local 2091 and National Association of Government Employees, Local R3-05-06 ("Unions" or "Complainants" herein) filed this Unfair Labor Practice Complaint with the District of Columbia Public Employee Relations Board (PERB) against the District of Columbia Water and Sewer Authority ("WASA" or "Respondent" herein) alleging that WASA had committed an unfair labor practice in violation of D.C. Code §1-617.04(a)(1) and (5) by refusing to "bargain over the implementation of new employee identification cards and new electronic time clocks...used for time and attendance". Unfair Labor Practice Complaint, p. 3. In its answer, filed on May 28, 2003, WASA denied that it had committed any unfair labor practice in this matter. Complainants amended the complaint on June 6, 2003, adding the allegation that WASA had dealt directly with employees in its letter of May 27, 2003 about the implementation of the new system while refusing to bargain with the Unions. WASA responded on June 24, 2003, denying the charges, and contending that Complainants had not exhausted their remedies

under the Master Agreement on Compensation and Working Conditions ("Master Agreement" herein).

Complainants next filed a motion for preliminary relief asking PERB to enjoin WASA from implementing the electronic time clocks until it bargained with the Unions. In its response, WASA sought dismissal of the motion, contending that the Unions had not filed a negotiability appeal and that WASA had never refused to bargain over the impact and effects of the new system. Subsequent pleadings were filed by the parties on this motion

On June 30, 2003, the Unions filed a Negotiability Appeal[1], arguing that WASA should have negotiated with the Unions about its decision to use time clocks and the policies and procedures before implementing its decision. Complainants contended that WASA had "unlawfully withheld information" needed by the Unions thereby impeding the Unions' ability to make substantive written proposals. (Negotiability Appeal, p. 3). In its Answer to the Unions' Negotiability Appeal, Respondent argued that PERB should dismiss the matter because it was not properly before the Board. Alternatively, it argued that its implementation of the new system was a management right and that WASA had never refused impact and effects bargaining.

The Board denied the Unions' motion for preliminary relief. In its Decision, issued September 30, 2003, the Board concluded that preliminary relief was not appropriate where, as in the instant matter, there were material facts in dispute. (Slip Op. 721, PERB Case No. 03-U-34). These matters were consolidated by the Executive Director on October 10, 2003.[2]

The prehearing conference took place on October 21, 2003. The proceeding took place on December 9 and December 10, 2003 at the PERB offices located at 717 14th Street, N.W. in the District of Columbia. The parties were given an opportunity to, and did in

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[1]This matter was assigned PERB Case No. 03-N-04.

[2]The unfair labor practice and negotiability complaints were consolidated. Complainants had filed a Notice of Impasse and Request for Impasse Resolution on May 29, 2003 contending that Respondent's failure to respond to the Unions' proposal should be deemed an impasse. (PERB Case No. 02-I-08). Respondent argued that it was premature to declare an impasse. However, the matter was withdrawn at the Unions' request on June 23, 2003.

fact, present documentary and testimonial evidence.[3] Melinda Holmes, Esq. represented Complainants. Kenneth Slaughter, Esq. and Brian Hudson, Esq. represented Respondent. In addition to the representatives, the following individuals were present on one or both hearing days: Olu Adebo, WASA Controller; Barry Carey, Local 2091 Vice President; Troy Coates, Local 631 Chief Shop Steward; Steven Cook, WASA Labor Relations Manager; Barbara Milton, Local 631 President; Delores Stevens, Local 2091 Recording Secretary; and Frank Walton, Local 2091 Treasurer/Chief Steward.

The parties elected to submit written closing arguments and did so on February 19, 2003.[4] The record was then closed.

II. **Issues**

A. Did WASA have a duty to engage in full bargaining with the Unions prior to the implementation of the new time keeping/data collection system or was its decision a "management right" requiring impact and effect bargaining?

B. Did WASA commit an unfair labor practice by refusing to engage in good faith impact and effects negotiations?

C. Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of new system while refusing to bargain with the Unions?

D. Did WASA refuse to negotiate about its decision to use time clocks to keep track of work time and it decision over the policies and procedures for implementing the time clocks?

III. **Laws, Rules and Regulations**

A. *Comprehensive Merit Personnel Act (CMPA)*

§1-618.4 Unfair Labor Practices *(in pertinent part only)*

(a) The District, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(5) Refusing to bargain collectively in good faith with the exclusive representative.

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[3]Exhibits are cited as "Ex" followed "J" if introduced jointly, "U" if introduced by Complainant Union or "R" if introduced by Respondent WASA; followed by the number of the exhibit. The transcript is cited as "Tr." followed by the page number(s).

[4]The time for filing briefs was extended twice at the request of the parties.

B. *Rules of the Public Employee Relations Board*

520.11 The purpose of hearings under this section is to develop a full and factual record upon which the Board may make a decision. 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. The procedures of Sections 550-557 of these rules shall apply to the hearing.

532.1 If in connection with collective bargaining, an issue arises as to whether a proposal is within the scope of bargaining, the party presenting the proposal may file a negotiability appeal with the Board. If the Board determines that an impasse has occurred regarding noncompensation matters, and an issue of negotiability exists at the time of such impasse determination, the negotiability issue must be withdrawn or a negotiability appeal filed with the Board within five (5) days of the Board's determination as to the existence of an impasse. Except when otherwise ordered by the Board in its discretion, impasse proceedings shall not be suspended pending the Board's determination of a negotiability appeal.

532.3 Except as provided in Subsection 532.1 of these rules a negotiability appeal shall be filed within thirty (30) days after a written communication from the other party to the negotiations asserting that a proposal is nonnegotiable or otherwise not within the scope of collective bargaining under the CMPA. A response to the negotiability appeal may be filed within fifteen (15) days after the date of service of the appeal.

C. *Master Agreement on Compensation and Working Conditions* (October 4, 2001) (Ex. J-1)

Part II: Working Conditions

Article 2: RELATIONSHIP OF THIS AGREEMENT TO AUTHORITY POLICIES AND PRACTICES

In exercising authority to establish regulations relating to the Authority's policies in matters affecting working conditions of employees covered by this Agreement, the Authority shall have due regard for the obligations set forth in this Agreement.

If any policy or regulation of the Authority is in conflict with a provision of this Agreement, the Agreement shall prevail.

No authority regulations on a negotiable issue is to be adopted or changed without first taking into consideration the

Local Unions' point of view or allowing the Local Unions an opportunity to offer suggestions or alternatives.

Article 4: MANAGEMENT RIGHTS *(in pertinent part only)*
Section A: General
D.C. Code Section 1-618.8 of the CMPA establishes management's rights as follows:

1. The Authority shall retain the sole right, in accordance with applicable laws and rules and regulations:
   a. To direct employees of the Authority;
   b. To hire, promote, transfer, assign and retain employees in positions within the Authority and to suspend, demote, discharge or take other disciplinary action against employees for cause;
   c. To relieve employees of duties because of lack of work or other legitimate reasons;
   d. To maintain the efficiency of the Authority operations entrusted to them;
   e. To determine the mission of the Authority, its budget, its operations, the number of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work, or its internal security practices; and
   f. To take whatever action may be necessary to carry out the mission of the Authority in emergency situations.

2. All matters shall be deemed negotiable except those that are proscribed by the CMPA...

Section B. Impact of the Exercise of Management's Rights and Bargaining over Negotiable Issues

1. Management rights are not subject to negotiations. In accordance with D.C. law, the Authority shall bargain with the Local Unions over the impact and effect of its exercise of enumerated Management rights. In addition, the Authority shall bargain over subjects that have otherwise been deemed negotiable under the D.C. law.

2. The Authority shall give the President of each Local Union advance written notice of changes in personnel policies, practices, or working conditions affecting employees covered by this Agreement. The Local Unions shall have the opportunity to exercise their full rights to bargain.

Article 33: NEW TECHNOLOGY *(in pertinent part only)*
Section A - Definition: New technology shall mean the acquisition, introduction, and implementation of new equipment, systems, methods and procedures that have not previously been used

by the Authority to modify, update or improve existing Authority processes by a substantial measure.

Section B - Union Notification Requirements: The Authority shall consult with the appropriate Local Union(s) at least sixty (60) calendar days prior to the acquisition or implementation of any new technology that may adversely impact employees. No less than forty-five (45) calendar days prior to the implementation of such equipment or system, the Authority shall provide written notice to the appropriate Local Union(s) that shall include the following:

1. The Authority's description of the new technology or system and the timing for implementation.
2. The Authority's assessment of the impact on covered employees.
3. The Authority's assessment of whether training shall be required for employees affected by the implementation. If training is required, the notice shall describe the training opportunities that the Authority shall provide at its expense.
4. The Authority's assessment of the economic impact of the implementation on the Authority's operations.

The appropriate Local Union(s) shall be provided with the opportunity to exercise its full rights to bargain under Part II, Article 4, Section B, Management Rights, following consultation and notice of the introduction of new technology. However, such bargaining shall not delay the implementation of the new technology.

IV. Summary of Proceedings and Undisputed Facts

Complainants, American Federation of Government Employees (AFGE), Locals 631, 872, 2553; American Federation of State, County and Municipal Employees (AFSCME), Local 2091; and National Association of Government Employees (NAGE), Local R3-05-06 are the exclusive bargaining representatives of bargaining unit employees of WASA, and are parties to the Master Agreement on Compensation and Working Conditions (Ex J-1). Collectively, they have been certified by PERB as Compensation Unit 31.[5]

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[5]AFGE, Local 631, represents approximately 200 bargaining unit employees in Engineering and Technical Services, Waste Water Treatment and Procurement. AFGE, Local 872, represents about 190 employees in Water Services and Water Management and Billing. AFGE, Local 2553, represents about 59 Sewer Services employees. AFSCME, Local 2091, represents approximately 340 employees working in Sewer Services, Maintenance Services, Materiel Management and Facilities and Security. NAGE, Local R3-06, represents about 22 employees in Budget and Finance. (Tr, pp. 33-34).

WASA is responsible with providing potable water and sewage collection to the District of Columbia metropolitan area. It employs more than 800 individuals. In 1999, WASA was removed from the District of Columbia payroll system and the following year, it established its own payroll and personnel system which replaces the manual system previously used to record time and attendance. In 2001, it developed a computerized time and attendance system. It is "an integrated system that requires an identification device [and] has a data collection terminal that collects...data with respect to time and attendance". (Tr, p. 102). The new system utilizes identification badges also known as facility access cards (FAC), that are "swiped" by employees at data collection terminals. Employees swipe their cards through one of the data collection terminals before and after their tours-of-duty and lunch periods. The data collection terminals, placed at various locations, automatically record time and attendance each time they are swiped. There is also a security component. The card has the Employee's picture, which serves as an identification badge, and also controls access into certain areas. (Tr, p. 103). The system is agency-wide and affects bargaining unit employees as well as non-union employees.

In the Unfair Labor Practice Complaint, the Unions contend that "Respondent has refused to bargain over the implementation of new employee identifications cards and new electronic time clocks that will be used for time and attendance". Complainants maintain that they sought to bargain on at least two occasions, but were rebuffed by Respondent. In the amended complaint, they add the allegation that WASA dealt directly with employees about the implementation of new badges and time clocks while refusing to bargain" with the Unions.

The Unions contend that the new system is not merely new technology, but rather is "part of an overall program that has materially changed pay and leave policies and created a new basis for discipline that had not previously existed". (Tr, p. 13). Therefore, they contend that implementation is a mandatory subject of bargaining, requiring WASA to give the unions advance notice and a meaningful opportunity to bargain before implementation. As relief, Complainants seek a return to the *status quo* and the opportunity to engage in meaningful negotiations.

Barbara Milton, Local 631 President, testified that the data collection terminals and electronic time clocks were discussed at the November 2002 labor-management meeting and a presentation was made. After that meeting, the Union presidents wrote to Mr. Cook asking to bargain and asking for information. (Tr, pp. 262-264, Ex. J-2A). The witness recalled that there were no labor-management meetings in December 2002 and January 2003, and that at the

February 2003 meeting, when the Union presidents asked Mr. Cook why he had not responded to their letter, and he informed them that he had. She had not received the letter, and obtained a copy after the February meeting. (Tr, pp. 266-268, Ex. J-2B). Ms. Milton testified that the Unions responded to the letter by asking his availability to bargain. She stated that the Unions raised the matter again at the May meeting. (Tr, p. 269).

Ms. Milton testified she received Mr. Cook's May 14 response shortly after the unfair labor practice complaint was filed. (Tr, p. 270, Ex. J-2E). She stated that the letter contained WASA's first offer to bargain, but that WASA wanted proposals from the Unions first. Complainants contend that since the purpose of time clocks is to keep track of time for the purpose of compensation and benefits, it "is itself a working condition and is therefore negotiable". (Negotiability Appeal, p. 2). Ms. Milton stated the Unions could not make written proposals about the time clocks because it lacked information since the Unions did not know all of the issues and aspects of the changes. She claimed that the Unions were given "teeny bits and bites" of information causing "a lot of frustration". (Tr, pp. 300-301). WASA did not provide answers to the questions raised by the Unions in its June 10 letter, but rather invited Complainants to attend a meeting on June 13. (Tr, pp. 270-272, Exs 2E, 2G).

WASA's General Manager notified WASA employees about the implementation of the new system by letter dated May 27, 2003. (Tr, p. 37, Ex U-2). According to the witness, the new time clocks were implemented on or about August 9, 2003. (Tr, p. 48).

The witness testified she participated in negotiating the recent Master Agreement, and that these matters were not raised while the parties were in negotiations, particularly when "new technology" as contemplated in Articles 4 and 33 was discussed. (Tr, pp. 58-59, Ex J-1).

The Unions contend that the new system has changed practices related to leave. Ms. Milton testified that employees now take leave in fifteen minute increments, whereas before employees were paid on an hourly basis for regular time, an employee reporting 15 minutes late would have to take leave for a full hour. ((Tr, pp. 43, 67, Ex U-3). Another change, according to the witness, is that employees are now permitted to "swipe in" only fifteen minutes before their tours-of-duty whereas before they could sign in whenever they got to work. (Tr, pp. 44-45, Exs U-3, U-4). She pointed to a memorandum from the supervisor of the solids processing section telling employees that now that they were trained on the new system, they had to swipe in no earlier than 15

minutes before the tour-of duty and no later than seven minutes after the end, because to do otherwise would result in unauthorized overtime. The memorandum stated that employees would be subject to disciplinary actions if the problem became "repetitive". (Ex U-4). She testified that employees were not receiving correct pay since the new system was installed and stated that the handwritten method was more accurate. She noted that a grievance regarding the accuracy of the time clock. (Tr, pp. 278-286, Ex U-8).

Ms. Milton stated that the Unions sought to bargain over WASA's decision to implement the new system. The witness testified that the Unions sought to have the issue of WASA's refusal to bargain on these matters at the February 18, 2003 and May 20, 2003 labor-management meetings. (Ex U-7). She stated that there was no discussion of electronic time clocks at any labor-management partnership meeting. (Tr, pp. 274-275). Ms. Milton testified that at one point she offered dates to Mr. Cook, by indicating that the Unions could bargain the next week, but that he responded that WASA was not yet ready to bargain. (Tr, p. 306). The witness stated that in response to the Unions' efforts to engage in full bargaining, WASA stated it would bargain only over "impact and effect". (Tr, p. 46). Ms. Milton testified that there were two meetings on these issues. At the second meeting, on or about June 13, 2003, the Unions told management they were entitled to engage in full bargaining over WASA's decision to implement the policy. (Tr, p. 47). Ms. Milton added there was one additional meeting that she had not attended. (Tr, p. 50).

Ms. Milton testified that identification (ID) badges were not new to employees, but that prior to the new system, the ID badges did not interface with the payroll system and did not control access. The witness stated that the Unions did not disagree that access to the facility was a security issue and reserved as a management right, but that the Unions were concerned with the timekeeping aspect. (Tr, p. 304).

WASA contends that the new system is "truly a kind of new technology contemplated by the parties in their contract as a management right". (Tr, p. 17). It maintains that the new system improves and updates existing procedures for tracking time and attendance. Implementation of the system, WASA argues, does not change any term or condition of employment. (Tr, pp. 19-20). Respondent estimates that more than 300,000 time sheets were processed manually, and each time sheet had to be entered manually by a timekeeper. That is no longer required. WASA contends that the new system reduces the likelihood of error and saves significant time and resources.

WASA alleges that it met its obligation by offering to bargain over the impact and effects of the new system, but that the Unions rejected its offer. Despite the formal rejection, WASA contends it communicated with the Unions and implemented many of the changes suggested by the Unions. (Tr, pp. 136-139). Respondent claims the negotiability appeal should be dismissed because "there is no issue of negotiability before the Board" since the WASA "never communicated in writing that it considered the specific proposal to be nonnegotiable". (*Id*). Alternatively, it argues that the negotiability appeal should be dismissed as untimely.

WASA contends that it kept Union leadership fully informed throughout the process of developing and implementing the new system, and further that it met its legal obligation by offering to engage in impact and effects bargaining. Members of its task force, headed by Controller Olu Adebo, met with Union leadership formally and informally although no Union leaders were on the task force. Stephen Cook, Manager of Labor Relations, stated he was appointed to the task force because WASA knew it had to "inform and educate employees and...union leadership regarding what we were doing, why we were doing it, how we were doing it. So it was an integral part of the planning process, to educate and inform". (Tr, p. 113). Mr. Cook testified that Union leaders were first given information at a labor management meeting in approximately October 2002 which was attended by the five Union presidents. He said members of the task force involved in payroll and security participated in that meeting. (Tr, pp. 114-115). WASA also provided formal written information and responses as well as informal communications. (Tr, pp. 118-122, Exs J-2, A-1).

Mr. Cook testified that WASA was prepared to engage in bargaining over the impact and effects of the new system, but that the Unions declined its offer. (Tr, p. 193). He stated that management was prepared to enter into impact and effects bargaining at the June meeting, but that the unions stated they wanted to engage in full bargaining:

> We got to the meeting...they were saying, "well, we're not here to impact and effects negotiations, we believe that this is..." I think they used the term full bargaining... (Tr, p. 134).

The witness stated that the individuals attending the meeting on behalf of WASA did not leave the meeting, but rather remained and entered into a discussion with Union leaders, including Ms. Milton, on various issues. Mr. Cook testified that he considered the meetings in June and August with Union leadership to be bargaining. (Tr, p. 168). He testified that management responded to all of the

questions raised by Union leaders, and that "there was a back and forth dialogue and questions and answers". (Tr, p. 173).

Mr. Cook testified that the new system does not change what is required of employees, i.e., that they report to work on time and that they report their time accurately. (Tr, p. 125). Managers had and continue to have discretion to excuse tardiness. (Tr, p. 126).

With regard to new technology, Mr. Cook that WASA complied with all notification requirements imposed where there is no adverse impact anticipated. (Tr, pp. 187-189, Ex J-2D).

Olu Adebo testified that he has been WASA Controller for approximately two years. He is the WASA official responsible for implementing the data collection system project. He explained that the data collection system is maintained under payroll because it is a "key tool" for gathering timekeeping information. It is also integrated with the security system. Mr. Adebo stated that in addition to saving work hours for employees who were involved in timekeeping when it was on paper, the new system has also reduced the amount of time needed by the employee to fill out time sheets. The witness testified that the new system is more accurate than the manual paper one.

According to Mr. Adebo, several task forces were created in approximately January 2003 to deal with the transition to the new system. (Tr, p. 220). The steering committee consisted of the Mr. Adebo and the directors of the human resources (HR) and information technology (IT) departments. The people responsible for putting the infrastructure together were part of the task force. There was a functional task force with payroll and HR staff, individuals who understand the "intricacies of the different setups". (Tr, p. 219). There was a communication team "charged with making sure that the message that was delivered was consistent and accurate...to all employees and every end user". (*Id*). Finally, there was a team, made up of project team members who got employees involved in setting up some of the procedures. (*Id*).

Mr. Adebo testified that he first communicated with bargaining unit employees in October or November 2002 when he brought a new time clock to a meeting organized by Mr. Cook which was attended by all the Union presidents and some senior managers. Mr. Adebo stated that copies of a schematic diagram of how the system would operate were distributed. (Tr, p. 220, Ex A-1). After this meeting, the witness stated, the parties met "practically every month" at labor-management and/or labor-management partnership meetings. (Tr, pp. 223, 243-244). He stated that he participated

in WASA's responses to the Unions on January 30, 2003 and May 14, 2003.(Tr, p. 225, Ex J-2B and D). Mr. Adebo testified that the data collection terminals were discussed at every labor-management and partnership meeting he attended during this period. (Tr, p. 246).

The witness testified that the Unions had "input" in this process. (Tr, p. 229). He stated that in addition to the meetings and letters, there was "a lot of informal contacts, literally hallway contacts, telephone". (Tr, p. 226). He noted that the Communication Team tried to "manage the communication [to] make sure that the message was consistent". (Tr, p. 227). Mr. Adebo stated that he spoke with "every single union president" about their concerns and/or questions regarding the data collection terminals. (Tr, p. 228).

According to Mr. Adebo, "rounding off" was implemented because management agreed with the Unions that employees could not all clock-in or clock-out at the prescribed time, but might have to wait on line for several minutes. The witness stated he addressed the issue of "rounding off" at meetings, formal and informal. He stated that the issue was difficult because in addition to start and end time, employees take lunch and other breaks. He testified that at the August 8 meeting with the Union presidents the "overwhelming preference" was to go with the wider range, i.e., 15 minutes. (Tr, pp. 232-233). Also, due to the recommendations from the Union presidents and the task force, the number of time clocks was increased and additional locations were added. (Tr, p. 235). He noted that if an employee forgets to swipe, the former procedure will be used, i.e., use of manual entry. Mr. Adebo testified that authorization of overtime has not changed.

Mr. Adebo stated he attended a Steering Committee meeting with Union presidents. He did not remember the date, but recalled that Mr. Cook had told him

> we had to bargain or something, that we went into bargain, and the union said they were not here to bargain or something, that they had a court case. So we sat through and went through about a couple of hours...And so we went through and did a back and forth answering their questions. (Tr, p. 250).

V. **Analysis, Findings and Conclusions**

At issue in these consolidated matters is the obligation, if any, WASA was required to satisfy prior to implementing the new system with its attendant timekeeping, attendance, identification and security components. The Unions claim full bargaining was required. WASA argues full bargaining was not required because

implementation of this system was within its management rights. If full bargaining was required, then WASA committed an unfair labor practice, because it agrees it did not undertake full bargaining before implementation. If full bargaining was not required, the inquiry must proceed to the next issue, i.e., did WASA commit an unfair labor practice by failing to engage in impact and effects bargaining. Complainants contend WASA did not engage in such bargaining although it was requested by the Unions, while Respondent maintains that even though the Unions refused to engage in impact and effects bargaining, such bargaining took place. The issue before PERB in the negotiability complaint is whether WASA refused to negotiate on the issues of the new system during negotiations. The Unions contend WASA refused, a charge that WASA denies.

A. *Did WASA have a duty to bargain with Unions prior to the implementation of the new time system or was the decision a "management right" requiring impact and effects bargaining?*

Management rights are those responsibilities reserved to an employer, which exempt it from the duty it would otherwise have to engage in full bargaining before implementation. Article 4 of the Master Agreement which incorporates D.C. Code Section 1-618.8, provides a general definition of management rights. Of relevance here, are the provisions which give WASA the authority:

a. To direct employees of the Authority;
d. To maintain the efficiency of the Authority operations entrusted to them;
e. To determine the mission of the Authority, its budget, its operations, the number of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work, or its internal security practices; and
f. To take whatever action may be necessary to carry out the mission of the Authority in emergency situations.

The Unions argue that with the exception of the security component of the new system, which they agree is a management right, Respondent was obligated to bargain before implementing the new system because it was a significant change from the prior procedures and changed the terms and conditions of employment. Complainants point to "rounding off" and the requirement that employees clock in or out within a specified time or risk disciplinary action as new practices. WASA, on the other hand, contends that the system comes within the definition of its management rights and does not represent a major change, that it is an improvement of the old system, and that it

The National Labor Relations Board (NLRB) has looked at a number of cases involving changes to timekeeping systems. It has made no broad sweeping standards, but rather has examined each case on its merits. The cases turn on whether the changes were significant and substantial. *See, Murphy Diesel Company,* 184 NLRB 757 (1970). Both parties in this proceeding have cited *Rust Craft Broadcasting of New York, Inc.* 225 NLRB 65 (1976) and *Bureau of National Affairs, Inc.* 235 NLRB 8 (1978) in their closing briefs, so the Hearing Examiner examined both decisions carefully and with particular interest. Unions' Post-Hearing Brief, p. 14; Post-Hearing Brief of the District of Columbia Water and Sewer Authority, p. 23.

In both *Rust Craft* and *Bureau of National Affairs,* the employers had instituted time clocks without bargaining with the Unions. The Board started its inquiry in both cases with whether a timekeeping system had existed before the time clocks were installed. In both cases, employees had been required to keep track of their time, *albeit* more informally. The Board concluded that the employers in these cases did not commit an unfair labor practice by "initiating a more dependable method of enforcing its longstanding rule that employees record their time". 225 NLRB No. 65, p. 327. The Board stated that an employer was "free to choose the more efficient and dependable methods for enforcing its workplace rules", and that under the circumstances presented, "introduction of the time clocks was but a part of the day-to-day managerial control which it was free to exercise". On the other hand, in cases in which employees had not previously been required to keep track of their time, the Board concluded the change was significant and the employer had committed an unfair labor practice by installing a time clock without bargaining with the union. *Nathan Littauer Hospital Association,* 229 NLRB 1122 (1977).

In the instant matter, it is undisputed that WASA employees have always been required to keep track of their time. The testimony at the proceeding was that timekeeping and attendance were previously maintained manually. The Master Agreement serves as the appropriate starting point. It is replete with provisions regarding work hours, lunch breaks, rest breaks, etc.. Section L of Article 37 provides that:

> Employees are required to work at the scheduled starting time and return from breaks or meal period on time.

The Master Agreement does not require that specific methods to be used by employees to record time, only that accurate timekeeping be maintained. The Master Agreement is also silent on "rounding off" or disciplining employees who sign in early. But in

addition to requiring accuracy of reporting, it also provides for managerial discretion:

> Occasionally, unavoidable circumstances may cause an employee to be late. Unavoidable tardiness from duty of less than one (1) hour, for a bona fide reason, may be excused without charge to annual leave, sick leave or leave without pay, at the discretion of the immediate supervisor. *See,* Section L of Article 37.

Using the *Rust Craft* and *Bureau of National Affairs*, the Hearing Examiner concludes that Complainants did not establish that the new system constituted a significant change. Employees have always been required to keep records of their time and attendance. They have always been required to report to work on time and to take their breaks at specific times. The new system is a more dependable and technologically advanced method of achieving these goals, even if there have been glitches in the system which has resulted in one or more grievance having been filed. There is no requirement that the new system be error-proof. In addition, WASA presented evidence that supervisors would retain the discretion to excuse lateness and that if necessary, an employee could use the manual method of record keeping.

With regard to the argument that discipline may now be imposed if an employee clocks in or out outside of the parameters noted above, the Hearing Examiner points out that Section L of Article 37 concludes that "[t]he failure of an employee to follow the provisions of this subsection may result in disciplinary action". The provision relates to reporting to work at the scheduled time. Thus, employees who did not report at the scheduled time were always subject to discipline. As noted above, however, the new system, consistent with the Master Agreement, also provides for managerial discretion in this area.

Alternatively, WASA argues that the new system comes within the definition of "new technology" contained in Section A of Article 33 of the Master Agreement which defines new technology as "the acquisition, introduction, and implementation of new equipment, systems, methods and procedures that have not previously been used by the Authority to modify, update or improve existing Authority processes by a substantial measure." The Master Agreement requires WASA to consult with the affected Union at least 60 calendar days prior to the acquisition or implementation of any new technology that may adversely impact employees. WASA must also provide written notice to the Union with specific information at least 45 calendar days prior to the implementation of such equipment or system. The Master Agreement,

Article 33, Section B, provides that while the Unions have "the opportunity to exercise its full rights to bargain under Part II, Article 4, Section B, Management Rights, following consultation and notice of the introduction of new technology...such bargaining shall not delay the implementation of the new technology." *See*, Ex J-1, *supra*. The Unions does not argue that WASA failed to provide the required notification, but rather that WASA did not mention the new system when the parties were in contract negotiations. However, WASA is not barred from introducing new technology because it was not discussed at the time the contract was negotiated. The new system comes within the definition of the Master Agreement, i.e., it is a new system that was not previously been used which is designed to substantially improve existing procedures. *See* Article 33, Section A. Therefore, pursuant to Article 33, WASA was not required to delay implementation pending full bargaining, but was required to engage in impact and effects bargaining, upon request.

In sum, the Hearing Examiner concludes WASA did not commit an unfair labor practice by implementing the new system since it was exercising a reserved management right. *Teamsters, Local Unions No. 639 and 730 v. District of Columbia Public Schools*, PERB Case No. 89-U-17, Opinion 249 (November 1, 1990). She further concludes that the new system constitutes "new technology" consistent with the definition in the Master Agreement and that pursuant to Article 33 of the Master Agreement, WASA was not required to engage in full bargaining prior to implementation.

B. Did WASA commit an unfair labor practice by refusing to engage in impact and effects bargaining?

As noted above, the inquiry does not stop with the finding that WASA acted within its management rights, since the Union also contends that management refused to engage in impact and effects bargaining. WASA contends that it did not refuse to engage in impact and effects bargaining. Rather it contends that even though Unions declined to engage in impact and effects bargaining maintaining that full bargaining was required, impact and effects bargaining did take place.

Article 4 Section B(1) of the Master Agreement requires WASA to bargain with the Unions "over the impact and effect of its exercise of enumerated Management rights". WASA was required to give each Union President "advance written notice of changes in personnel policies, practices, or working conditions affecting employees covered by this Agreement." *See* Ex J-1, *supra*. The Unions do not dispute that they were given written notice, but contend that WASA did not engage in good faith bargaining.

This Board has long held that "the effects or impact of a non-bargainable management decision upon the terms and conditions of employment are bargainable upon request." *University of the District of Columbia Faculty Association v. University of the District of Columbia*, PERB Case No. 82-N-01, Opinion 43 (November 1, 1990). The violation of the duty to bargain is based not on the unilateral implementation of a management right decision, but rather on the employer's failure to bargain over the impact and effect of such a decision once the request to bargain has been made. *See, e.g., American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, PERB Case No. 94-U-09, Op. 418 (March 29, 1995).

In determining if an employer has committed an unfair labor practice, the NLRB looks at whether an employer has demonstrated "good faith". *NLRB v. Alva Allen Industries, Inc.* 369 F.2d 210 (8th Cir.). Good faith bargaining requires timely notice and a meaningful opportunity to bargain about the effects of a management decision prior to implementation. *International Ladies Garment Workers Union v. NLRB,* 446 F.2d 907, 919 (D.C. Cir 1972). This inquiry is made on a case-by-case basis.

There was considerable testimony at the hearing about meetings with Union officials where the new system was discussed and demonstrated. There was also testimony from both Mr. Cook and Mr. Adebo about informal conversations and meetings with Union officials. WASA asserted that a number of the suggestions from Union officials were implemented by management. However, these informal meetings and conversations between WASA management and Union officials where management received "input" from Unions are insufficient "to fulfill the duty to bargain over the impact of its management right". *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, PERB Case No. 99-U-44, Op. 607 (November 19, 1999). Similarly, in *International Brotherhood of Police Officers v. D.C. General Hospital*, 39 DCR 9633, Op. 322 (November 19, 1995), the Board concluded that affording a Union with "the opportunity to provide input" prior to implementing a management decision constitutes a refusal to bargain in good faith, on request, over the impact and effects of a managerial decision.

Meetings alone are not sufficient to satisfy the obligation to bargain. The meeting must consist of bargaining, i.e., a meaningful exchange between the parties. *AFSCME, et al. v. University of the District of Columbia, et al.,* PERB Case No. 92-U-24, Op. 343, 43 DCR 1148 (1993). In *American Federation of Government Employees, Local Union No. 2725, AFL-CIO v. Department of Public and Assisted Housing,* PERB Case No. 92-U-21, Op. 404

(October 12, 1994) the Board agreed with the Hearing Examiner's conclusion that "by merely consulting with [the union] over the impact and effects of the realignment, [the agency] did not satisfy its statutory obligation under the CMPA and thereby violated D.C. Code Sec. 1-618.4(a)(1)(5).

WASA contends that it agreed to, and did in fact, engage in impact and effects bargaining despite the Unions' insistence on full bargaining at the June meeting. He testified that management and the Union leadership, engaged in meaningful discussions that resulted in implementing some changes suggested by the Unions. WASA considered this meeting and the one in August to have been impact and effects bargaining. (Tr, pp. 47, 168). Although Mr. Adebo did not recall the date of the meeting, he too testified that management and Union leaders stayed for several hours and discussed the issues after the Unions rejected WASA's offer to engage in impact and effects bargaining. (Tr, p. 250).

The refusal to bargain alleged in the Complaint refers to the full bargaining requested by the Unions, not the impact or effects bargaining. Ms. Milton's testimony supports WASA's position that WASA offered to bargain on impact and effects and that some bargaining took place. Ms. Milton testified that in response to the request by the Unions for bargaining over WASA's decision to implement the time clock system, WASA agreed to bargain only over "impact and effect". (Unfair Labor Practice Complaint, p. 4, Tr, p. 46). She stated that at the June 13, 2003 meeting, Complainants told Respondent they were entitled to engage in full bargaining over WASA's decision to implement the new system. She testified WASA stated that the Unions "were limited" to impact and effects bargaining. (Tr, p. 47). Similarly, in their Negotiability Appeal, Complainants state:

> By letter dated June 9, 2003...WASA noted its willingness to engage in impact and effects bargaining over the time clocks. The Union-Petitioners responded by letter dated June 10, 2003...reiterating their position that WASA negotiate over the decision to use the time clocks. (Negotiability Appeal, p. 4).

Mr. Cook's letter of June 9 inviting the Unions to meet to discuss their proposals, was not limited to time clocks. Indeed the subject of the letter was "Request for Impact and Effects Bargaining Concerning Automated Time and Attendance Data Collection". (Ex J-2F). The response by the Unions dated June 10, states that:

> the Unions did not request to bargain over impact and effect...we ask to engage in full bargaining. We

> believe that this is a mandatory subject of bargaining that effects the terms and conditions of employment for employees we represent. (Ex J-2G).

Mr. Cook's June 13 letter confirms that, at least in WASA's view, the June meeting was "over the impact and effects of the Authority's implementation of the Automated Time and Attendance System". (Ex J-2H). Mr. Cook noted in the letter that the Unions had taken the position that they "have not requested, nor do they intend to request, impact and effects bargaining". The Unions' June 16 reply states:

> The Authority has been informed since November 26, 2002 that the Unions consider the matter of time clocks used for time and attendance, an issue that is a mandatory subject of bargaining, not impact and effect".

Further support for the position that the Unions considered the matters to be subject to mandatory bargaining, is its May 20, 2003 letter to Mr. Cook stating

> Although you may consider the clocks new technology, we consider it as a change in the methods of keeping time and attendance and a mandatory subject of bargaining under the law. (Ex J-2E).

There was no evidence presented that the Unions changed their position and agreed to engage in impact and effects bargaining. However, if Complainants did change their position, or if they felt the June session was not sufficient impact and effects bargaining, even if they did not change their position, given their earlier position, additional efforts should have been made. There was no evidence that WASA ever refused to engage in impact and effects bargaining. But PERB has stated that when there is a negative response, another effort be made by the Union. That guidance is particularly useful in this case where Complainants were demanding full bargaining and Respondent was offering impact and effects bargaining. The Board stated:

> the better approach, upon being faced with an effective refusal to bargain over any aspect of a management decision, is to then make a second request to bargain with respect to the <u>specific</u> effects and impact of that management decision on bargaining unit employees' terms and conditions of employment. *International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital*, PERB Case No. 91-U-14, Op. 322 (July 15, 1992).

Based on these findings, the Hearing Examiner concludes that Complainants did not meet their burden of proving that Respondent engaged in an unfair labor practice by refusing to engage in impact and effects bargaining, upon demand.

3. Did WASA commit an unfair labor practice by dealing directly with employees about the implementation of new employee identification card badges and new electronic time clocks while refusing to bargain with the Unions?

The amended Complaint alleges that WASA notified the Unions it was going to implement an electronic time clock at a labor-management meeting in October 8, 2002, and that WASA also told Complainants of its plan to utilize the new identification badges which would "interface with the new electronic time clocks and be used for time and attendance. Amended Unfair Labor Practice Complaint, pp. 3-4. WASA employees were notified by letter from WASA's General Manager Jerry N. Johnson dated May 23, 2003 that WASA would be implementing the automated time and attendance program which replaced the manual program. (Ex U-2). The new system was used on or about August 9, 2003. (Tr, p. 47).

Complainants contend that WASA committed an unfair labor practice by contacting employees directly while refusing to bargain with the Unions. WASA agrees that it met with employees about the new system, and does not dispute that it sent employees the May 23 letter. However, given the conclusion that WASA did not refuse to engage in impact and effects bargaining, the Hearing Examiner concludes that Complainants did not meet their burden that WASA circumvented the Unions in this matter.

D. Did WASA refuse to negotiate about its decision to use time clocks to keep track of work time and it decision over the policies and procedures for implementing the time clocks?

In their negotiability appeal filed on June 30, 2003, Complainants seek PERB's determination that the issue of the decision to use time clocks and the decision over the policies and procedures for its utilization are negotiable. Negotiability Appeal, p. 2. The Unions contend that they did not advance substantive proposals because "WASA has unlawfully withheld information". (*Id*, p. 3). Finally, Complainants argue that the appeal is timely because "WASA has not expressed its position that the time clocks are non-negotiable in writing". (*Id*).

WASA contends that the matter is not ripe since Complainants concede that they did not make any proposals. Answer to the Unions' Negotiability Appeal, p. 3. Alternatively, it argues that its implementation of the new system was a management right and

that WASA had never refused impact and effects bargaining. Alternatively, WASA points to two proposals made in Complainants' May 20 letter, and contends that it never responded that the proposals were nonnegotiable. (*Id*, p. 4).

PERB rules require that in order for a negotiability appeal to be ripe, a declaration of nonnegotiability must be made in the context of collective bargaining. *Teamsters Local Unions No. 639, 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, PERB Case No. 90-N-01, Op. 299 (1992). Although Board Rules do not impose a time limit within which management must declare nonnegotiability, PERB requires that the declaration be made before the termination of bargaining. *Teamsters Local Unions No. 639, 730, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools*, PERB Case No. 94-N-06, Op. 4039 (September 19, 1994).

The Hearing Examiner does not find that the matter was untimely filed in that Mr. Cook's letter of June 9, 2003 was captioned "impact and effects", thus clearly rejecting the Unions' efforts for full bargaining. The appeal was filed on June 30, within the requisite time frame. However, she concludes that this matter should be dismissed for several reasons. First, the Hearing Examiner concluded, for the reasons stated above, that the subject of this negotiability appeal came within the definition of management rights and did not require bargaining before implementation. Alternatively, she concluded that the subject of this appeal involved new technology within the definition of the Master Agreement, and did not require bargaining before implementation. In addition, the Hearing Examiner found that WASA provided the Unions with information about the new system prior to implementation. The information was provided at meetings and in communications. (See, e.g., Ex. J-2, and pp. 11-13, *infra*). Complainants did not meet their burden that information was unlawfully withheld from them by WASA.

VI. **Conclusion and Recommendation**

Based on the documentary and testimonial evidence as well as the discussion presented herein, the Hearing Examiner recommends that both of these matters be dismissed.

Respectfully submitted,

Lois Hochhauser

Lois Hochhauser, Esq.
Hearing Examiner

March 18, 2004

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