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GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
American Federation of Government Employees, Local Union No. 3721,	)	
Complainant,	)	PERB Case No. 90-U-11
	)	Opinion No. 287
v.	)	
District of Columbia Fire Department,	)	
Respondent.	)	

DECISION AND ORDER [1]/

On February, 20, 1990, the American Federation of Government Employees, Local 3721 (AFGE) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board) alleging that the District of Columbia Fire Department (DCFD) violated D.C. Code Sec. 1-618.4(a)(1) and (5) of the Comprehensive Merit Personnel Act (CMPA) by the publication of a November 9, 1989 memorandum announcing unilateral changes in leave and standby duty policies and by the subsequent implementation of these policies. AFGE contended that DCFD was obligated to negotiate over these matters before issuing the memorandum and that DCFD's promulgation of the leave and standby-duty policies violated the terms of the parties' collective bargaining agreement concerning these subjects.

DCFD, by Answer filed March 7, 1990, denied the commission of any unfair labor practices. DCFD further moved to dismiss the Complaint based on its contentions that (1) it was untimely filed and (2) the Board is without jurisdiction to consider matters that concern alleged violations of the parties' collective bargaining agreement. (Ans. at 2.)

By Notice dated June 22, 1990, the Board referred this matter to a hearing examiner who heard the case on October 19 and

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[1]/ Members Kohn and Danowitz did not participate in either the discussion or decision of this case.

29, 1990, and January 29, 1991. [2]/ In a Report and Recommendation submitted to the Board on June 17, 1991, (a copy of which is appended to this Opinion), the Hearing Examiner recommended that: (1)"the allegations of the Complaint which were grounded in the failure or refusal of [DCFD] to bargain with the Union prior to promulgating and posting EAB Memorandum 89-23 [,i.e., November 9, 1989 Memorandum,] must be rejected as time-barred [3]/ and (2) "the claim that Respondent violated the duty to bargain in good faith imposed by the CMPA by breaching the [Collective Bargaining] Agreement when it imposed mandatory standby duty and placed new limitations and procedures upon the receipt of unscheduled annual leave for the periods of November 23 and 24, 1989, December 22 to 26 1989, and December 29, 1989 to January 2, 1990, [be] deferred to the grievance and arbitration procedures of the parties' Agreement for resolution, with the Board retaining jurisdiction over the matter for possible limited Spielberg type review [4]/ of the outcome of that process." (R&R at 58 and 63.)

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[2]/ By letter dated May 23, 1990, this matter was initially administratively dismissed by the Board's Executive Director as untimely filed. However, upon further review following AFGE's request for reconsideration, the merits of the Complaint, including the issue of timeliness, were referred to the hearing examiner.

[3]/ As noted in the text, AFGE filed its Complaint on February 20, 1990. The conduct alleged by AFGE as a violation of D.C. Code Sec. 1-618.4(a)(1) and (5), i.e., DCFD's failure to bargain prior to the publication of EAB Memorandum 89-23, was found by the Hearing Examiner to be "complete as of November 9, 1989" 103 days prior to the filing of the Complaint. (R&R at 57.) Interim Board Rule 103.1 (now Board Rule 520.4(a) requires unfair labor practice complaints to be filed by a labor organization "not later than ninety (90) days after the date on which the alleged violation(s) occurred[.]"

[4]/ This scope of review was first articulated by the National Labor Relations Board in Spielberg Manufacturing Company, 112 NLRB 1080 (1955), wherein the NLRB held that it would defer to the contractual process where an arbitration award had been issued prior to the filing of the unfair labor practice complaint if, (1) the statutory issues were presented to and considered by the arbitrator, (2) the arbitration proceedings were fair and regular, (3) the arbitration proceedings were final and binding on the parties, and (4) the arbitration award is not repugnant to public policy. See e.g., The Fraternal Order of Police, Metropolitan Department Labor Committee and Metropolitan Police Department of the District of Columbia, 31 DCR 2204, Slip

(continued...)

In making this latter recommendation, the Hearing Examiner concluded, based on prior Board precedent, that consideration by the Board, "ab initio", of claims of contractual breach "cannot be determined by the Board on its merits." (R&R at 60.) No exceptions were filed by either party to the Hearing Examiner's findings, conclusions and recommendations contained in the Report and Recommendation.

Pursuant to Section 1-605.2(3) of the District of Columbia Code and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and the entire record. The Board hereby adopts the Hearing Examiner's findings and conclusions that DCFD's refusal to bargain prior to publishing the November 9, 1990 Memorandum violated D.C. Code Sec. 1-618.4(a)(1) and (5) is time-barred for the reasons stated in the attached Report. We also adopt the findings and conclusions of the Hearing Examiner with respect to the Board's lack of jurisdiction to resolve claims that are limited to alleged violations of contractual agreements. Regarding the deferral issue, the Board adopts the Hearing Examiner's findings and conclusions to the extent consistent with the following rationale.

In Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55, 36 DCR 7097, Slip Op. No. 205, PERB Case No. 87-U-11 (1989), we observed that "[w]hile some state and local laws make the breach of a collective bargaining agreement by employer or union an unfair labor practice, the CMPA contains no such provision, nor do we find such a necessary connection implicit in the Act." (Id. at p. 3) We further observed that "[u]nder the CMPA, breach of a contract does not constitute a per se statutory violation." Consistent with this pronouncement, in Georgia Mae Green v. District of Columbia Department of Corrections, 37 DCR 8086, 8089, Slip Op. No. 257 at p.4, PERB Case No. 89-U-10 (1990), we ruled that "the Board (and therefore ...its Examiner) is without jurisdiction to rule in contract breach claims as such."

The Board therefore concludes that AFGE's allegation that Respondent's actions --the implementation of leave and standby-duty provisions contained in its November 9, 1989 Memorandum-- violated an addendum to the parties' collective bargaining agreement, does not state an unfair labor practice proscribed

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[4](...continued)
Op. No. 72, PERB Case No. 84-U-01 (1984). However, no arbitration award has been issued concerning the matters addressed in the instant case. Furthermore, no grievance is pending and, as noted by the Hearing Examiner, "both parties...did not wish to pursue the grievance and arbitration process." (R&R at 62.)

under the CMPA. [5]/ Thus, since no issue within our jurisdiction would remain for our review, we are without authority to retain jurisdiction in this matter. We therefore do not adopt the recommended disposition by the Hearing Examiner -- that the Board retain jurisdiction and defer this allegation of contract breach to the parties' grievance/arbitration process -- but instead dismiss it for want of jurisdiction. [6]/

With respect to all other findings, conclusions and recommendations, we find the Hearing Examiner's analysis and reasoning to be thorough, well-reasoned and persuasive. We therefore adopt them in their entirety. [7]/

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[5]/ Unlike charges in the nature of a refusal to bargain over a mandatory subject of bargaining or a unilateral change in established and bargainable terms and conditions of employment (not covered under an effective agreement between the parties), an alleged violation of a collective bargaining agreement concerns a breach of an obligation contractually agreed-upon between the parties, whereas the former concerns alleged violations of obligations statutorily imposed. The CMPA provides for the resolution of the former while the parties have contractually provided for the resolution of the latter, vis-a-vis the grievance and arbitration process contained in their collective bargaining agreement.

[6]/ The Hearing Examiner correctly notes that we have retained jurisdiction for subsequent review following the disposition through the grievance and arbitration process of allegations which relate specifically to the parties' collective bargaining agreement. However, in such cases, interpretation of the invoked provisions was "both necessary and appropriate to a determination of whether or not a noncontractual, statutory violation has been committed." Fraternal Order of Police, Metropolitan Police Department v. District of Columbia Metropolitan Police Department, 31 DCR 2204, Slip Op. No. 72 at p.6, PERB Case No. 84-U-01 (1984). The record does not support that the alleged contractual violation herein, if found, may also support or state an unfair labor practice under the CMPA. See n.4, supra.

[7]/ Having no jurisdiction over this allegation, we consequently lack the authority to direct the parties to arbitration as recommended by the Hearing Examiner. However, the Board's action does not foreclose AFGE and DCFD from agreeing to pursue this matter through the parties' contractual grievance and arbitration procedures including any issues concerning the timeliness of such a grievance.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

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

October 9, 1991

ATTACHMENT

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION NO. 3721, COMPLAINANT v. DISTRICT OF COLUMBIA FIRE DEPARTMENT, RESPONDENT.	PERB Case No. 90-U-11

Before: Ira F. Jaffe, Esq., Hearing Examiner

APPEARANCES:

For the Complainant:

Beth S. Slavet, Esq.
(Beth S. Slavet, P.C.)
Calvin Haupt, President, AFGE Local Union 3721

For the Respondents:

Sharon L. Paul, Esq.
(Labor Relations Officer, OLRCB)
Danny Ray Mott, Deputy Director, Emergency Ambulance Bureau, District of Columbia Fire Department

BACKGROUND

On February 20, 1990, AFGE Local 3721 ("Union" or "Local 3721" or "Complainant") filed an unfair labor practice Complaint against the District of Columbia Fire Department ("Department" or "Respondent"). The Complaint asserted that the Department violated its statutory obligation to bargain in good faith with the Union by placing employees on standby duty and by establishing a new procedure for the handling of leave during the Thanksgiving and Christmas Holidays in 1989 and the New Year's Holiday in 1990 without having first bargained in good faith to impasse with the Union. EAB Memorandum 89-23, issued by John M. Cavenagh, Director, Emergency Ambulance Bureau ("EAB"), to all EAB personnel

on November 9, 1989, provided in its entirety that:

SUBJECT: Unscheduled Leave During Holiday Season

Historically, the EAB has experienced critical staff shortages during the holiday seasons of Thanksgiving, Christmas, and New Years. This has been primarily the result of increases in unscheduled leave usage during those periods. To assure adequate coverage for the upcoming holiday seasons, the following procedures will be implemented to offset anticipated staffing shortages:

(1) Annual Leave -- Annual leave will not be approved during these holiday periods.

(2) Emergency Annual Leave -- Emergency Annual Leave will have to be requested through the Chief Supervisor, who will confer with the Assistant Director of Operations for approval.

To supplement the on-duty platoons for the holidays, members will first be asked to volunteer to work either as pluses on a shift or to standby at home. Interested volunteers should respond to their immediate Supervisor by November 14th for the Thanksgiving holiday and by December 12th for the Christmas and New Years holidays. If there are an insufficient number of volunteers, then personnel will be selected by management chosen from a list of all off duty employees. Selections will be based on seniority with junior personnel selected first in each category of provider (EMT/A, EMT/IP, EMT/P). Standby will be for twelve hour periods, from 0600 hours to 1800 hours and from 1800 hours to 0600 hours. Members on standby at home must be reachable by telephone, therefore the use of answering machines will not be permitted.

Any employee who is called to report for duty must arrive within an hour of notification. In accordance with Article 6 of the Collective Bargaining Agreement, those in at-home standby status will be compensated at a rate of 25% of his/her basic hourly rate of pay for each hour on standby. All personnel called in to work will be paid overtime commencing from the time that the employee is called until the duty assignment is completed. All personnel called in to work will be relieved at the end of their standby time, no one will be required to remain on duty past the two hour time limit.

The Thanksgiving holiday period begins at 0600 hours on Wednesday, 11/22/89 and ends on Friday 11/24/89 at 0600 hours. The following are the dates, times, and platoons that are on day off for Thanksgiving:

-- 11/22/89 Platoon A
-- 11/22/89 Platoon C (Night work only)
-- 11/23/89 Platoon A (Day work only)

The Christmas Holiday period begins at 0600 hours on Friday, 12/22/89 and ends on Tuesday 12/26/89 at 0600 hours 0600 hours (sic). The following are the dates, times, and platoons that are on day off for Christmas:

-- 12/24/89 Platoon B (Day work only)
-- 12/24/89 Platoon D
-- 12/25/89 Platoon A
-- 12/25/89 Platoon C (Night work only)
-- 12/26/89 Platoon A (Day work only)
-- 12/26/89 Platoon C

The New Year holiday period begins on Friday, 12/29/89 at 0600 hours and ends on Tuesday, 1/2/90 at 0600 hours. The following are the dates, times, and platoons that are on day off for New Years:

-- 12/31/89 Platoon A (Day work only)
-- 12/31/89 Platoon C
-- 01/01/90 Platoon B
-- 01/01/90 Platoon D (Night work only)

The Complaint in this case alleged in pertinent part that:

1. On or around February 9, 1989, the parties signed a collective bargaining agreement. That Agreement adopted an Addendum . . . regarding Hours of Work, Tour of Duty, and Schedules for emergency ambulance personnel involved in the direct delivery of services or operational personnel, i.e., Emergency Medical Technicians, Intermediate Paramedics, and Paramedics assigned to ambulance and/or Medic Units.

2. The Addendum provided a specific procedure for making modifications to the schedule excepting only emergencies or unforeseen staffing needs.

3. On or around November 9, 1989, the Respondent published a Memorandum re: Unscheduled Leave During Holiday Season. Such memorandum cancelled annual leave and established mandatory standby

> duty for operational personnel for certain holiday periods: 11/22/89-11/23/89; 12/24/89-12/26/89; and 12/31/89-01/01/90.
>
> 4. Respondent took such action which affected conditions of employment of employees represented by Complainant in flagrant violation of the parties' collective bargaining agreement.
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> 5. Respondent took such action without first negotiating with the Complainant.
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> 6. Complainant requested management . . . to rescind and/or negotiate on such action on or around December 15, 1989. On or around January 2, 1990, Respondent John Cavenagh indicated to Complainant that the action was wrongful and that he had directed its rescission.

The Complaint also sought as relief a finding that the Department violated Section 1-618.11, 1-618.17, and 1-618.4(a)(1) and (5) of the CMPA; that an appropriate notice be posted; that the Board direct "any and all other remedies" found appropriate by the Board; and that the Department be directed to cease and desist from changing conditions of employment, and specifically the hours of work, tours of duty, schedules and mandated periods of stand-by pay, without first negotiating with the Union. The Union also represented that the issue has not been raised and was not pending in any other procedure.

The Department filed its Answer to the Complaint on March 7, 1990. In addition to denying the allegations of the Complaint, the Department moved to dismiss the Complaint on the basis of its assertions that: 1) the Complaint was untimely filed; and 2) the aspects of the Complaint which were grounded in the Union's claim of contractual breach were exclusively reserved under the PERB decisional law to the negotiated grievance and arbitration process and were not within the jurisdiction of the Board.

On May 23, 1990, Margaret P. Cox, Esq., Executive Director of the PERB, administratively dismissed the Complaint on grounds of failure to adhere to Board Interim Rule 103.1 which requires that a complaint by a labor organization be filed within ninety days of the alleged violation. Ms. Cox noted in pertinent part that:

> Since the alleged unlawful conduct was the changing of the schedule on November 9, 1989, and the Complaint was not filed until February 20, 1990, I am forced to conclude that the Complaint is untimely. On the face of the Complaint, there are no other asserted facts that would warrant a different conclusion.

On May 25, 1990, the Union requested reconsideration of the dismissal. The motion for reconsideration argued that: a) the cause of action did not accrue until the cancellation of leave took place and thus at least the Christmas and New Years changes in leave policy were the subject of timely challenge; and b) given the January 2, 1990 alleged representation of the Department that the memorandum would be rescinded, the time limit for filing a Complaint should be tolled as of that date.

On June 4, 1990, the Department urged that the decision of the Executive Director be upheld. In addition to its earlier arguments, the Department asserted that the posting of the November 9, 1989 memorandum was the triggering act; that the implementation of standby and leave policy without bargaining cannot be viewed as a series of acts; and that the alleged rescission of the memorandum after it was no longer of any effect was irrelevant to the question of the time in which a Complaint was obligated to have been filed.

On June 22, 1990, Ms. Cox wrote to the Parties advising that, after review of the request for reconsideration and the response thereto, and after consultation with the Board, it was determined that the Complaint, including the issue of timeliness, would be referred to a Hearing Examiner.

The Board appointed the Undersigned to serve as that Hearing Examiner and hearings were held on October 19 and October 29, 1990, and on January 29, 1991. Post-hearing briefs were filed on March 20, 1991, and the time for issuance of this Report and Recommendations was extended through June 17, 1991.

At the outset of the hearing, the Department moved to dismiss the Complaint on grounds of timeliness and failure to state a claim upon which relief could be granted to the extent that the Complaint was based upon the claim that the Department's actions violated the provisions of the Parties' collective bargaining Agreement. Those Motions were deferred pending completion of the factual record relative to both the merits of the allegations of the Complaint and the procedural issues related to the timing of any breach of the obligation to bargain in good faith, as well as the Union's claims that the time limits contained in the Board's regulations be tolled. It was inferred that the Board must have contemplated having the timeliness issue decided only after development of the evidentiary record. If the Board intended that the Complaint be dismissed on its face as untimely despite the Union's arguments or, conversely, be found timely regardless of the Department's arguments, little point would appear to have been served by referring the matter initially to the Hearing Examiner for the rendition of a Report and Recommendation on that issue.

The remainder of the Background portion of this Report and Recommendations will be divided into the following sections: 1) Prior Discussions of the Parties Relative to Placing Non-Apparatus EAB Employees on Standby; 2) The Parties' Meetings Relative to the Changes Effected by EAB 89-23; and 3) The Standby Pay Provisions of the Compensation Agreement.

1) Prior Discussions Relative to Placing Non-Apparatus EAB Employees on Standby

a) Discussions Related to the Compensation Agreement Negotiations

There was no dispute that, prior to the implementation of EAB Memorandum 89-23, the use of standby duty in the EAB had been limited to apparatus personnel and CWA represented dispatch personnel.

The record also reflected that, prior to 1989, annual leave periods had been assigned for the entire pay year in advance of the start of the pay year. In 1990, however, the EAB determined that annual leave periods would begin on January 30, 1989 and that the last leave period would end on December 21, 1989. That decision was made in late January, 1989 or early February, 1989. There was no evidence that the change in annual leave scheduling was grieved or otherwise formally challenged by the Union or by any of the affected employees. To the contrary, the testimony of Calvin Haupt, President, Local 3721 since December, 1989 and First Vice-President of the Union prior to that time, revealed that the Union was concerned about the Bureau's actions; that the matter was discussed at several labor-management meetings; and that the matter was never resolved to the Union's satisfaction.

Nathaniel E. James, Special Event Coordinator, EAB, and formerly President, Local 3721 from approximately 1984 to 1987, testified that he was a participant in the negotiations which led to the Fiscal Year 1985 to 1987 Compensation Agreement; that the issue of who was to be placed on standby was discussed in side bar negotiations conducted between representatives of the District and both AFGE and CWA; that prior to late 1984, apparatus personnel (i.e., those maintenance persons who serviced the fire trucks, ambulances, supervisors vehicles, and other emergency apparatus) were not scheduled to work evenings or weekends; that it was clear that coverage was needed in the evenings and weekends to handle equipment which broke down on the street and required repair; and that after side bar negotiations, it was agreed that the apparatus division personnel and also the dispatch personnel would be placed on standby status to fill-in as needed, with their pay governed by the terms of the Compensation Agreement. A memorandum, dated November 19, 1984, from Donald H. Weinberg, former

Director, OLRCB, to former Chief Theodore Coleman, confirmed the placement of apparatus employees and dispatch personnel on standby. According to Mr. James, the negotiated arrangement included a rotational arrangement for standby with a further understanding that the EAB would be flexible if a person on standby could not be contacted.

Mr. James testified further that the issue of placing other EAB employees on standby was never discussed. The Union inferred from this silence that the Department could not place employees on standby since they had not affirmatively negotiated such a right. The Department inferred, to the contrary, that absent some limitation upon its rights, it enjoyed the discretion to schedule whomever it wanted on standby duty, provided that the terms of the Compensation Agreement governing pay for that duty were satisfied.

Mr. James also explained that throughout the tenure of his Presidency there were severe staffing shortages in the EAB and that the shortages were handled in a number of ways, including the following: a) use of volunteers from the off duty roster; b) overtime; c) transfers of firefighters into EAB positions; d) "running down" (downgrading) of Advanced Life Support ("ALS") units to Basic Life Support ("BLS") units; and e) taking units out of service altogether. Mr. James also noted that these same alternatives are used when additional personnel are needed to handle special staffing needs (e.g., in situations when foreign dignitaries are visiting the District).

Frank M. Fishburne, Executive Vice-President, Local 3721, and formerly President, Local 3721, from about 1986 to 1989, testified that he attended some of the bargaining sessions for the 1985 to 1987 Compensation Agreement; that there was no real discussion as to who standby pay would apply to; and that, at the end of those negotiations, Mr. Weinberg, the Chief Negotiator for the District, stated that whoever was on standby would stay on standby and whoever was not on standby would not be placed on standby. Mr. Fishburne further stated that it was his understanding that this commitment to freeze the standby status of employees applied on a District-wide basis. No evidence of such an understanding in other Departments was introduced into the record.

Mr. Haupt testified that, as one of the representatives of Local 3721, he attended all of the meetings during the Fiscal Year 1988 to 1990 Compensation Agreement; that during those negotiations questions arose regarding standby duty concerning the amount of pay, restrictions on employees on standby, and the use of pagers; that, following discussions, it was agreed to put the matter off to the next set of negotiations; and that there were no negotiations about which employees would be on standby.

Mark Levitt, Acting Director and Director, OLRCB, since 1987, and Deputy Director, OLRCB immediately prior to that date, served as the Co-Chief Negotiator for the District for the Fiscal Year 1985 to 1987 Compensation Unit 1 and 2 negotiations. Mr. Levitt testified that Ron King was the Chief AFGE National Negotiator, George Bispham was the Chief AFSCME Negotiator, and Joanne Bell was the Chief CWA Representative in those negotiations; that the issue of standby was discussed during those negotiations; that the Union sought the standby pay provision since prior to that point in time employees received no pay for at home standby; and that there was no discussion of any limits being placed upon management's right to determine which employees would be scheduled for standby duty, but rather the issues discussed were how management would exercise that right and how much employees on standby would be paid. Mr. Levitt also specifically denied that the District promised during those negotiations to limit standby to those employees who were then currently being assigned standby duty.

Mr. King testified that the issue of standby pay was set aside initially because the parties treated it as a special compensation issue to be handled in side negotiations and that when Mr. Weinberg asked the Union how many employees were affected and learned that it was only a relatively small number of employees and thus not a large money item, the parties were able to reach agreement. Mr. King specifically recalled discussion of several groups of employees on standby duty, including snow removal employees and apparatus EAB personnel. Mr. King also had a "vague recollection" that problems existed in certain departments regarding how to work standby, but testified that there was no discussion about the implementation or application of standby duty in the Compensation negotiations; such matters were left for local working conditions negotiations since they did not involve pay issues.

b) Management Proposals to Extend Standby to Operations Employees in 1988

Mr. Fishburne testified that, in the summer of 1988, EAB management approached the Union about placing operational personnel on standby duty; that there was a meeting between the EAB and the Union on the issue; that no standby duty was implemented following those discussions; that the issue of standby duty arose again in or about December, 1988; that a second meeting was held; and that at no time in 1988 to the Union's knowledge was even a single operating employee placed on standby duty.

EAB Memorandum 32-88, dated August 5, 1988, issued by Mr. Cavenagh to all EAB employees, would have provided for the immediate implementation of standby/on call procedures for four spare EMTs. That memorandum, which provided for standby at home, was superseded and reissued as EAB Memorandum

33-88, dated August 12, 1988, to incorporate the changed standby provisions of the Fiscal Year 1988 to 1990 Compensation Agreement and to provide for beeper call. The EAB, however, never implemented that directive.

Mr. Cavenagh testified that the EAB was experiencing severe staffing shortages in June, 1988; that he spoke with OLRCB and was advised to consult with the Union prior to taking any action; that he did so and a meeting was held which was attended by himself, Danny Ray Mott, Deputy Director, EAB, and Edward Foy, Assistant Director, Operations, on behalf of the Bureau, and Mr. Brooks, Mr. Fishburne, and others he did not recall on behalf of the Union; and that after promulgating those August, 1988 memoranda, nobody was ever called in from standby.

Mr. Haupt testified that in or about June, 1988, the Bureau approached the Union to create a Paramedic standby pool; that the Union stated that the Bureau could not implement such an arrangement because it was not negotiated; that the Bureau took the position that it was a management right and further that Article VI of the Compensation Agreement granted to management the right to determine who was to be placed on standby duty; that the Union asserted that there was a side agreement limiting standby to apparatus employees and urged the Bureau to verify its claim with Mr. Levitt; and that the Union did not hear anything further, but that the proposed standby arrangement was never implemented in 1988.

Mr. Levitt testified that he received a telephone call from Mr. Cavenagh about standby for operational employees in 1988; that he advised Mr. Cavenagh that he had the right to order standby duty, but that he would be required to "pay for it" and that the cost could be heavy; and that the Compensation Agreement also required that employees be notified of their scheduling for standby in writing. Mr. Levitt did not recall having any other conversations with Mr. Cavenagh about the issue of standby and did not recall being asked specifically about a side agreement limiting standby to apparatus employees within the Local 3721 bargaining unit.

Mr. Mott testified that he participated in and recalled the discussions in the summer of 1988 relative to standby duty for EMTs; that the Union took the position that there was a side agreement which limited standby duty to apparatus employees and asked Mr. Cavenagh to check with OLRCB; and that Mr. Cavenagh stated that he spoke with Mr. Levitt and Sharon L. Paul, Esq., Labor Relations Officer, and was told that the Bureau could assign operating employees to standby.

Mr. Haupt also recalled that, prior to the holiday periods at the end of 1988, management again met with the Union and advised that it planned to place operational

employees on standby for the end of year holiday periods; that management raised concerns about having sufficient employees available to work the needed units; that there were discussions about pagers and alternatives to standby and both Parties related their prior positions on non-negotiability and the duty to bargain. The "bottom line" was that although a November 22, 1988 memorandum was issued again stating that a standby pool of 4 EMTs would be created, this memorandum also was not implemented and no operations employee was placed on standby for the 1988 holidays to the Union's knowledge. Mr. Cavenagh testified that the reason that neither 1988 standby pool memorandum was implemented was because there was no need to do so. Mr. Mott testified that the December, 1988 discussions took place exclusively between Mr. Cavenagh and the Union and he was unaware of their content.

Collective bargaining negotiations were then ongoing for the new Working Conditions Agreement. Neither Party raised the issue of standby duty in those negotiations or the related impasse proceedings, both of which involved detailed and protracted negotiations regarding the work schedules of EAB employees.

2) The Parties' Meetings Relative to the Changes Effected by EAB 89-23

On October 25, 1989, Mr. Cavenagh directed Mr. Mott to develop contingency plans to ensure full staffing for the holidays, including scheduling extra personnel and scheduling employees on standby. The written memorandum further directed Mr. Mott to "provide for union consult." Mr. Cavenagh testified that, during the holiday period the prior two years, the Bureau had experienced severe staffing shortages and had been required to downgrade units and take some units out of service due to a lack of manpower.

To implement that directive, Mr. Mott convened a management group which developed a draft memorandum providing for leave restrictions, surplus personnel, and standby. Mr. Mott also contacted the Union and a meeting to discuss the draft memorandum was held on or about November 3, 1989. The record was unclear as to whether a copy of the draft memorandum was provided to the Union prior to the first meeting. Mr. Mott stated that he decided on his own that only 25% pay, rather than time and one-half pay, was due to employees assigned to standby duty over the three holiday periods in question, and did not seek any advice or legal opinion as to the correctness of that determination.

The text of the Draft Memorandum was identical to that of the final memorandum, issued as EAB 89-23, with the following exception of the following paragraph which was contained in the Draft Memorandum and was deleted from the final memorandum:

> (3) Sick Leave -- If an employee requests sick leave and it is approved, upon the employees return a doctors excuse must be obtained and presented to the on-duty Supervisor before assuming duty. All doctor's slips will be verified by the Chief Supervisor. This will be accomplished by the Chief Supervisor calling the physician to verify the employee's visit.

After extensive discussion with the Union about the legality and propriety of this provision, Mr. Mott agreed at the meeting to remove this new sick leave verification procedure from the memorandum.

There was conflicting record evidence as to what took place at this union-management meeting. Neither Party introduced contemporaneous notes of the discussions. The recollections of the witnesses varied regarding the substance and detail of the meeting.

According to Mr. Fishburne, the participants at the meeting were Mr. Haupt, Al Brooks (who may have been Union President at the time), and himself, on behalf of the Union, and Mr. Mott, Mr. Cavenagh, and Verdova Bishop, on behalf of the Bureau. Mr. Fishburne later recalled that Melvin R. Neil, Chief Supervisor, and Twyla J. Gerace, Public Information Officer, also were present at the November 3rd meeting. According to Mr. Fishburne, the discussion was "pretty rough" and included Union objections to the new restrictions on the use of leave as contrary to the District Personnel Manual ("DPM"). Mr. Fishburne was not sure if there was discussion at the meeting about the compensation to be provided to employees on standby, but recalled that the EAB asserted a management right to assign employees to standby duty.

Mr. Haupt testified that, at the early November, 1989 meeting regarding the draft memorandum, there was heated discussion about the Bureau's plan to place operating employees on standby duty as well as in regard to the limitations the Department planned to place upon the use of annual and sick leave. Mr. Haupt testified that they went through the draft "line by line" and that many of the same arguments made when standby was discussed in 1988 were raised by each Party. Mr. Haupt stated that he "believed" that there was discussion at the meeting about the obligation to bargain; that the Bureau took the position that it was obligated to discuss the policy, but not to negotiate over its terms; and that the Union took the position that, absent negotiation the Bureau could not implement such an arrangement, but that, although they "were going to have a fight" over the matter, the Union was willing to negotiate if the Bureau wished to do so.

On cross-examination, Mr. Haupt conceded that the Union never asked to negotiate on the draft memorandum itself, but only sought to negotiate about the issue of whether employees would be placed on standby duty and that the Union did not ask to negotiate regarding annual leave, emergency annual leave, or sick leave procedures, since the Union's sole position was that the provisions of the draft memorandum were inconsistent with the governing portions of the DPM.

Mr. Cavenagh testified that he was not present at the portion of the November, 1989 meeting when the draft memorandum was discussed; that he was told that the only objection raised by the Union related to the sick leave provision; and that he agreed to delete the sick leave provision from the memorandum prior to its issuance. Mr. Cavenagh also testified that he understood that there was no contractual or legal restriction upon his right to assign employees to standby duty to ensure uninterrupted ambulance service over the holiday periods and that the inclusion of the pay provisions in the Compensation Agreement recognized management's ability to assign employees to standby duty.

Mr. Mott testified that the Union persuaded him that the sick leave provisions conflicted with the DPM since not everyone using sick leave could be deemed to have abused it and, therefore, that portion of the draft memorandum was not included in the version which was published on November 9, 1989. Mr. Mott also recalled that, during the early November meeting with the Union, discussion took place regarding the new procedures for requesting unscheduled annual leave and emergency annual leave, with the Union taking the position that the memorandum's provisions violated the DPM and management taking a contrary position. Mr. Mott further testified that he met "one on one" with Mr. Fishburne after the meeting at which time Mr. Fishburne stated that the sick leave portion was the Union's real concern and that, therefore, he believed that the version of the memorandum as finally issued would not cause problems. Mr. Mott denied that the Union ever requested to negotiate the issue of assignment to standby duty or the issue of the impact and implementation of the draft memorandum. Mr. Mott also conceded, however, that if such a request had been made, he would have referenced the provisions of the Compensation Agreement and taken the position that the EAB was under no obligation to negotiate regarding the placement of operations employees on standby duty.

Mr. Mott described the atmosphere of the early November, 1989 meeting as "civilized" and "friendly" and devoid of "hostility that [he] could perceive."

As noted earlier, EAB Memorandum 89-23 was posted on November 9, 1989. Mr. Mott also testified that the decision was made to reissue Memorandum 89-23 in December, 1989, in response to a Union request that it be reissued so as to

avoid problems related to employee "lapse of memory" and his agreement to that request. Mr. Haupt's testimony was unclear as to whether or not he recalled requesting that the Bureau repost the memorandum.

Mr. Haupt recalled another meeting prior to Thanksgiving at which time the Parties essentially restated and adhered to the positions advanced in the early November, 1989 meeting held in connection with this matter.

On December 8, 1989, a memorandum was posted which was identical to EAB Memorandum 89-23 with two exceptions: 1) it deleted reference to volunteers for the Thanksgiving holiday and to the scheduling of standby over the Thanksgiving holiday; and 2) it included the sick leave paragraph which had been removed from the draft memorandum following discussions with the Union. Mr. Mott explained that the December 8, 1989 memorandum resulted from the wrong version of the memorandum (i.e., the draft memorandum) having been used to create that document.

Mr. Haupt testified that he brought the matter to Mr. Mott's attention and complained about the reinstatement of the sick leave language, to which Mr. Mott replied that it was a mistake and would be corrected. On December 11, 1989, a new memorandum, labeled EAB 89-26, was posted. That memorandum was identical to the December 8th Memorandum with the exception that the sick leave paragraph was omitted. Stated differently, the December 11th memorandum was identical to the November 9th memorandum, with the exclusion of those portions of the November 9th memorandum which pertained exclusively to the Thanksgiving holiday period. No formal action was taken to "rescind" the December 8th memorandum, although Mr. Mott testified that it was "closed out," removed from all of the bulleting boards, and replaced with the accurate December 11, 1989 memorandum.

Mr. Fishburne recalled attending two additional meetings between EAB and Union officials relative to the standby/leave holiday period memoranda. Mr. Fishburne testified that there was a meeting held subsequent to the issuance of the December 8th memorandum at which Mr. Cavenagh, Mr. Mott, and Mr. Bishop were present on behalf of the Bureau, and Mr. Haupt, Mr. Brooks, and himself were present on behalf of the Union. According to Mr. Fishburne, Mr. Cavenagh stated at that meeting that he did not intend for the memorandum containing the sick leave paragraph to issue and that it would be rescinded; that Mr. Haupt requested an apology; that Mr. Cavenagh stated that he would rescind it; and that, although he issued a new December 11th memorandum he never formally rescinded the erroneous December 8th memorandum.

Mr. Haupt also recalled a meeting at which he and Mr. Fishburne represented the Union during which Mr. Cavenagh

conceded that the December 8th memorandum was in error and would be rescinded. Mr. Haupt testified that Mr. Cavenagh stated that the "whole thing" was wrong, that this copy should never have been released, and it "would be pulled"; that the Union team was divided as to whether Mr. Cavenagh could be taken at his word; that a vote was taken (why a vote was needed if only Mr. Haupt and Mr. Fishburne were present on behalf of the Union was never explained); and that it was decided to take Mr. Cavenagh at his word that the entire memorandum would be withdrawn.

Mr. Mott recalled a meeting held after December 11, 1989 at which the question of the December 8, 1989 erroneous memorandum was discussed. Mr. Mott also recalled Mr. Haupt having written a letter of protest to Mr. Cavenagh about the matter which had caused Mr. Cavenagh to get upset. No copy of that letter was introduced by either Party. Nor was its substance described by any witness. Mr. Mott did not recall any reply to that letter being sent by Mr. Cavenagh.

Mr. Mott's testimony was internally inconsistent as to whether or not OLRCB approved the sick leave language in the draft memorandum; as to whether or not he reviewed the notes of Mr. Bishop, the "official note taker"; and as to whether Mr. Bishop was even at the meeting of early November, 1989, when the draft memorandum was discussed.

Mr. Fishburne also recalled a meeting in late December, 1989 held between EAB and the Union at which Mr. Bishop and Mr. Mott were present on behalf of the Bureau and Mr. Haupt, Mr. Brooks, and himself were present on behalf of the Union. According to Mr. Fishburne, the Parties stood firm on their respective positions. At either this meeting or a prior meeting (he was not sure which) Mr. Fishburne testified that either Mr. Haupt or Mr. Brooks (he could not recall who) stated that the Union would be willing to negotiate, but that the Bureau replied that the matter was one of management rights and was non-negotiable. On cross-examination, Mr. Fishburne testified that it was at the early November, 1989 meeting that the request to bargain was made and the Department stated its position that the matter was non-negotiable.

On December 20, 1989, Mr. Haupt issued a memorandum to all members of Local 3721, in reference to the Unscheduled Leave Memorandum from Management dated December 8, 1989. The Haupt Memorandum advised the membership: 1) that the executive committee of the Union met with the Department in November 1989 when that memorandum was first circulated and advised management that the memorandum was inappropriate; 2) that the union never agreed to modify or override the DPM or the Agreement; 3) that "At current, action is being taken in the form of an Unfair Labor Practice submitted to PERB (Public Employees Relations Board) as a violation of the DPM and our current contract Article 6."; and 4) that employees

might be subjected to possibly "coersive (sic) acts by supervisory personnel"; three of the four cited instances refer to denials/conditions placed upon usage of sick leave -- that portion of the December 8, 1989 memorandum which was included in error and which did not appear in the December 11th memorandum -- and the fourth cited instance referenced denials of scheduled annual leave during the holidays, a condition which did not exist since no EAB personnel had scheduled annual leave during the Christmas and New Year's holiday periods.

The memorandum by Mr. Haupt did not cite any claim that the Department had agreed on December 15, 1989 to rescind EAB 89-23. As noted earlier, that claim was included in the Complaint later filed by the Union on February 20, 1990.

Mr. Haupt also testified that, on January 2 or 3, 1990, he met "one on one" with Mr. Cavenagh and again discussed the policy contained in Memorandum 89-23; that Mr. Cavenagh reiterated that he intended to withdraw the memorandum; that Mr. Cavenagh never took the policy back; and that he realized that he "obviously couldn't trust Cavenagh" and that "the effort was wasted."

Mr. Cavenagh specifically denied ever having told Mr. Haupt that he would rescind EAB 89-23.

Mr. Haupt was asked why he waited to file the Complaint in this case until February 20, 1991. He replied that it was "just the passage of time" without any rescission of the memorandum which caused him to file the Complaint, but that he wanted to give Mr. Cavenagh the opportunity to rescind the memorandum in the interest of a harmonious relationship.

3) The Standby Pay Provisions of the Compensation Agreement

The issue of standby pay arose as an issue for bargaining during the negotiations preceding the adoption of the Compensation Agreement in Compensation Units 1 and 2 for Fiscal Years 1985 through 1987. The Compensation Agreement, in Article VIII, Standby/On Call Pay, provided in its totality that:

> An employee required to standby at home shall be compensated at a rate of twenty-five percent (25%) of his/her basic rate of pay for each one (1) hour that the employee is required to remain on call and is not performing his/her normally assigned duties. The employee's schedule must specify the hours during which he/she shall be required to remain on call.

The standby pay provisions of the Compensation Agreement were amended in the Fiscal Year 1988 through 1990 Compensation Agreement to provide that:

Article VI, Pay for Standby at Home

Section 1:

To the extent the Fair Labor Standards Act (FLSA) is not applicable, an employee required to standby at home at the direction of the Employer shall be compensated at a rate of twenty-five percent (25%) of his/her basic rate of pay for each hour that the employee is required to remain on standby at home and is not performing his/her normally assigned duties.

Section 2:

The employee's schedule must specify the hours during which he/she shall be required to remain on call.

CONTENTIONS OF THE COMPLAINANT

Timeliness

The announcement on November 9, 1989 of the new policy regarding standby, annual leave and emergency annual leave procedures did not trigger the time for the filing of the instant Complaint.

The cause of action in this case did not arise on November 9, 1989, the date on which the Department's newly promulgated unilateral policy was announced. The real causes of action in this case arose on the dates on which the unilateral changes were actually implemented to the detriment of the bargaining unit and the exclusive representative. Adoption of an approach which focused upon the implementation of the memorandum would result in the causes of action being found to arise on November 22 through November 24, 1989, again on December 22 through 26, 1989, and a third time on December 29, 1989 through January 2, 1990. Thus, at least as to the Christmas and New Years holidays, the Complaint must be deemed timely filed.

This approach is supported by a number of National Labor Relations Board and Court cases. See WPIX, Inc., 293 NLRB No. 2, 131 LRRM 1780 (1989) (failure to pay contractually mandated wage increase was a continuing violation which could not be barred by the six month limitations period of the NLRA); Sevaco v. Anchor Motor Freight, 792 F.2d 570, 122 LRRM 3316 (6th Cir. 1986) (Section 301 action for breach of contract and breach of the duty of fair representation not time barred; Court of Appeals applied "continuing violation" analysis developed in cases involving discriminatory dues and failure to properly pay employees cases and held that

the suit was limited, however, to violations occurring within six months prior to the initiation of the suit and could not extend back to violations alleged to have occurred many years earlier); and American Geri-Care, Inc., 270 NLRB No. 13, 117 LRRM 1053 (1984) (finding pre-election wage increases allegedly implemented in violation of the NLRA time barred "because the increases were both announced and implemented outside the 10(b) 6-month period" but finding that the allegation that the announcement and implementation of a tuition reimbursement plan which did not attain final form until a date within the six month period was not time barred).

There also exist several reasons to equitably toll the 90 day period for the filing of a Complaint. The time periods for the filing of a Complaint are regulatory, not statutory in nature. Even under the NLRA where the limitations period is statutorily prescribed, the NLRB has embraced the concept of equitable tolling of the Section 10(b) period in appropriate cases. There should be no question that the 90 day provisions of the Interim Rules can be the subject of equitable tolling by the Board where warranted.

In this case, the Union delayed filing the Complaint based upon the promises of Mr. Cavenagh that the disputed policy would be withdrawn by the Department. The Board should not adopt an approach which encourages the filing of Complaints in such instances only to have them withdrawn if the promised withdrawal takes place. Rather, the Union in this case filed the Complaint promptly and well within the 90 day period following January 2, 1990, when Mr. Cavenagh last made the commitment to the Union to rescind EAB 89-23. The Union also was meeting with the Department during the period after November 9, 1989 and prior to Christmas, 1989 in an effort to persuade the Department to rescind EAB 89-23. Given those ongoing efforts, and the fact that the Complaint was filed within 90 days of the actual implementation of EAB 89-23, the Board should find that the Complaint was timely filed. See American Mirror Company, Inc., 269 NLRB 1091, 1093-94 (1984) (relying on both the continuing violation theory and fact that the union was unaware of the wage increases granted improperly during an organizing campaign until a later point in time for concluding that the challenge to those unilaterally granted wage increases was not time barred; it was also found, however, that the parties' subsequent entry into an agreement which was retroactive in regard to wages precluded any finding of an unfair labor practice).

It is also well established in NLRA case law that refusals to bargain are continuing types of violations. Application of this approach to the instant case would result in a finding that dismissal of the Complaint was inappropriate, but that the remedy could only address

violations which occurred during the 90 day period preceding the filing of the Complaint on February 20, 1990. See Iowa Electric Company, 264 NLRB No. 21, 111 LRRM 1276 (1982) (explicit rejection of a request for bargaining in order to test the validity of the certification was a continuing violation which could be asserted even beyond the six month period of Section 10(b) of the NLRA). Thus, at a minimum, the Board should permit the Complaint to cover the period encompassing 90 days from the date on which it was filed -- a period which would include the Christmas and New Year's holiday periods in their entirety.

The adoption of an approach which analyzes the three holiday periods independently for purposes of application of the 90 day time limitation is supported by the fact that the Department chose to make three separate postings of its changed policy. The first posting was on November 9, 1989. The second took place on December 8, 1989. The third and final posting took place on December 11, 1989. Until each succeeding notice was published, the Union could not know whether the Department planned to implement or rescind some or all of the unilateral changes. This is particularly true in view of the Department's stated intention in 1988 and earlier in 1989 to implement standby, only to then abandon its stated course. See NLRB v. R.O. Pyle Roofing, ___ F.2d ____, 96 LRRM 2680 (9th Cir. 1977) (employer untimely attempted to withdraw from multi-employer bargaining relationship and repudiated contract negotiated between multi-employer association representatives and the union; a conversation with the union's business agent in which the company allegedly disavowed that it was bound by the multi-employer association labor agreement was found insufficient to trigger the six month period; the Court of Appeals found that the union was not on clear notice of the employer's position until some later date within the six month limitations period). Absent clear notice to the Union of the Department's position, the 90 day period cannot be deemed to run. It is submitted that no clear notice was provided by the Department until December 11, 1989 at the earliest. Accordingly, the February 20, 1990 filing was well within the 90 day period for filing a Complaint specified in the Board's Interim Rules.

For all these reasons, the Board is urged to find the Complaint timely and deny the Department's Motion to Dismiss the Complaint as time-barred.

Jurisdiction to Hear Claims of Breach of Contract and Law, Rule and Regulation

The Department was in error when it maintained that a breach of the negotiated Compensation and Working Conditions Agreements cannot form the basis for a finding of an unfair labor practice. The Board decisions cited by the Department in support of its Motion to limit the scope of the Complaint

are all distinguishable and have been misinterpreted by the Department.

Any analysis of this issue must start with the fact that Section 1-618.2 grants the Board with independent jurisdiction to resolve unfair labor practices regardless of whether or not such claims could also be asserted in the negotiated grievance and arbitration procedure. The essence of the Complaint in this case is a violation of the CMPA -- Sections 1-618.11, 1-618.17, and 1-618.4 (a)(1) and (5) -- not the Agreement. The availability of an alternative forum does not divest the Board of its statutory jurisdiction to adjudicate the Union's claims.

The Department's reliance upon Opinion No. 257, Case No. 89-U-10, is misplaced. In that decision the Board stated carefully that: "The Examiner correctly noted in his Report that the Board (and therefore, he, as its Examiner) is without jurisdiction to rule on contract breach claims as such." (emphasis in original) The Union is not predicating its claim in this case solely upon its claim of breach of contract; rather, it is the unilateral actions of the employer in derogation of its obligation to bargain in good faith which is at issue.

The other decisions cited by the Department are also inapposite. In Case No. 83-U-14, the Board relied upon a conflict with a separate statutory scheme for resolving disputes falling within the Civilian Complaint Review Board Act of 1981. No such separate statutory scheme is involved herein.

In Case Nos. 84-U-01 and 83-U-03, the Board concluded that deferral to the grievance arbitration process was proper. Case No. 83-U-03 involved a situation in which a number of grievances involving the same matters at issue in the unfair labor practice proceeding had been filed and abandoned and others were filed and were still being prosecuted. The Board concluded in that situation that deferral was proper. In Case No. 84-U-01, the Board adopted the policy of the NLRB regarding deferral to arbitration. Part of the NLRB's deferral doctrine, however, is a willingness of both parties to arbitrate -- a condition lacking in this case.

Accordingly, the Board should conclude that the Union has properly raised issues of statutory violations; that no outstanding grievance was filed by the Union covering the same subject; that the Department has not agreed to arbitrate the matter; and that, accordingly, no basis exists for the Board to decline to assert jurisdiction over any of the Union's claims in this case.

The Merits

The implementation of the changes noted in EAB Memorandum 89-23 resulted in three unlawful changes in hours and conditions of employment: 1) standby duty was imposed upon a group of employees who were never placed on standby previously; 2) new procedures were introduced governing the exercise of sick leave and emergency annual leave for the holiday periods in question; and 3) the Department eliminated the ability of employees to take any unscheduled annual leave.

It is well established that a unilateral change in the status quo relative to the scheduling of work hours and standby is a violation of the NLRA. See Gasland, Inc., 230 NLRB 1132, 1134-36 (1977) (change from 4 day workweek to 5 day workweek with the 5th day an "on call" day violated the NLRA notwithstanding a contractual provision which had not been enforced for years which provided for a 5 day workweek; case arose in the context of a local union affiliation which was not recognized by the employer; failure to accord representational status to the successor union found violative of the NLRA); and The Dow Chemical Company, 244 NLRB 1060 (1979) (unilateral change in work scheduling from 7 days on and 2 days off to 5 days on and 2 days off was a "serious" unfair labor practice such that subsequent strike by union was lawful and discharge of strikers and rescission of labor agreement was violative of the NLRA).

The Federal Labor Relations Authority has similarly held that employer changes in employee work schedules is a mandatory bargaining subject under the CSRA and not encompassed by the statutory management right to act unilaterally in certain areas. See Veterans Administration and AFGE Local 1061, 23 FLRA 278 (1986) (and cases cited therein).

The Board has recently relied upon relevant NLRB decisional authority in interpreting and applying the duty to bargain under the CMPA. In Teamsters, Local Unions No. 639 and 730 v. District of Columbia Public Schools, PERB Case No. 89-U-17, Opinion No. 249 (1990), the Board concluded that the adoption of a drug testing program by the DCPS was outside the statutory duty to bargain as a result of the internal security practices provisions of Section 1-618.8 (a)(5), but that the effects or impact of the program was a mandatory subject of bargaining. The Board further held that the level of discipline was within the scope of issues subject to the obligation to bargain. The Board also rejected contentions that a provision in the parties' agreement regarding mid-term bargaining in cases of "mutual consent" over issues not covered by the agreement constituted a "clear and unmistakable" waiver of the union's rights to engage in effects bargaining. The Board reaffirmed the presumption of negotiability and was unpersuaded by arguments

that no unfair labor practice could be found until the Board ruled on the negotiability of a particular change in working conditions. The Board also addressed in Opinion No. 249 the issue of remedy. The Board decided not to grant a status quo ante remedy in that case, but declined to provide unqualified deferral to the processing of individual grievances through the grievance and arbitration process. The Board did direct bargaining and held that further processing of both the drug testing program and drug-related disciplinary grievances would be held in abeyance pending the conclusion of collective bargaining negotiations.

Applying this approach to the instant case, the Board should find that the Union had indicated a willingness to negotiate over the issue of whether the Department could implement standby in view of the provisions of the Compensation and Working Conditions Agreements; that the Department refused to bargain on this question, instead taking the position that it enjoyed the management right to act unilaterally; and that the unilateral promulgation of a standby requirement which changed the existing hours of work and working conditions violated the Act.

Further, even if the Board is somehow persuaded by the Department's argument that the implementation of standby was a management right -- a position vigorously opposed by the Union -- the fact remains that the procedures to be used to implement any new standby program would be subject to a duty to bargain prior to implementation. The Union had repeatedly made requests to engage in bargaining over both the decision to use standby for non-apparatus EAB personnel and also on the procedures to be used in implementing any standby system. The Union's position in this regard has not changed since the Department first announced the possibility in 1988 that it might place non-apparatus EAB personnel on standby.

The Department's claim that the Union failed to request bargaining must be rejected for several reasons. First, the Union's prior requests to bargain in 1988 and earlier in 1989 when standby for non-apparatus employees was proposed placed the Department on notice of the Union's desire to bargain. Second, the testimony of Mr. Haupt supported the Union's claim that it did request bargaining in November and December, 1989, relative to the Department's standby plan. Third, the Department took the position that the implementation of its standby plan was not a mandatory subject for bargaining. This position was repeatedly stated during the discussions which took place in November and December, 1989, and also were repeated at the hearings in this case both by Counsel for the Department and also by Mr. Mott. It is well established that the union cannot be found to have waived bargaining over a change which was presented as an a fait accompli or where the demand to bargain would have been futile due to the employer's announced intention not to bargain over the particular subject. See Gulf States

Manufacturing, Inc. v. NLRB, 704 F.2d 1390, 1397 (5th Cir. 1983); Ciba Geigy Pharmaceuticals, 264 NLRB 1013 (1982); and Intersystems Design and Technology Corporation, 278 NLRB No. 111 (1986).

Even after one applies the provisions of Article VIII of the Compensation Agreement, many questions relative to the implementation of EAB 89-23 remained, including the method of selecting employees to serve on standby; the periods for which standby was to be utilized; and the availability of other alternatives, including the use of voluntary overtime, transfers of firefighters into the EAB, and the conversion of ALS units to BLS units or the taking of units out of service altogether.

The Department's claim that the Union had waived the right to object to its scheduling of employees on standby by virtue of Article VIII of the Compensation Agreement must be rejected. First, the Department has the burden of proving that the Union has clearly and unmistakably waived its right to bargain. The record does not support such a finding by the Board.

The evidence was undisputed that the Department in effect revoked the ability of employees to take unscheduled annual leave during the holiday periods and also had previously eliminated scheduled vacations during the Christmas and New Year's holiday periods. The net effect was to prevent any employee from taking annual leave during those periods. While emergency annual leave was not totally eliminated, the new procedures placed upon the grant of EAL requests effectively restricted employees' ability to take EAL and coerced many employees into not even requesting EAL. The taking of annual leave at times desired by employees is an integral part of the benefit. By denying any employee the ability to take annual leave during the Christmas and New Year's holiday periods, the value of that benefit was diminished.

The Department's claim that it enjoyed the management right under Section 1-618.8(a)(4) and 1-618.9 to act unilaterally must be rejected. Section 1-618.9(b) states that "All matters shall be deemed negotiable except those that are proscribed by this chapter." The decision of the Board in Case No. 89-U-17, Opinion No. 249, reaffirmed the presumption of negotiability. This presumption is particularly appropriate given the Parties' extended negotiation to impasse on the issues of basic work schedules. Further, in the past when the Department has announced that it intended to utilize standby, it has always rescinded that action upon challenge by the Union to that new position.

The Department's reliance upon the maintenance of efficiency (Section 1-618.(a)(4)) is misplaced. Throughout

prior holiday periods, with identical scheduling problems, the Department chose to respond by use of voluntary overtime, the use of firefighters, and downgrading units or placing them out of service. The Department managed to operate during the 1990-91 holiday periods without the need to resort to standby. The Department managed to operate during Thanksgiving, 1989, with employees on scheduled annual leave and without any undue staff shortages or disruption of service. No reason was shown as to why, with the additional staffing created by the lack of scheduled annual leave, standby was also needed for the Christmas and New Year's periods. In fact, the Department failed to establish that any of the employees on standby were actually called in to perform needed work.

Further, the budgetary problems and the need to place units out of service or to downgrade the units from ALS to BLS units, was a commonplace occurrence throughout the year. The Department should not be able to seize upon that occurrence to justify its unilateral actions in this case.

The Department's claim that the inclusion of standby pay provisions in the Compensation Agreement operated to waive the right of the Union to bargain over the question of requiring EAB employees to be on standby must be rejected. First, as noted above, the Compensation Agreement addressed only the issue of pay for those categories of employees who previously had been placed on standby by the District. The limited application of that Compensation Agreement provision was supported: 1) by the side negotiations held between the officials of Local Union 3721 and the District at the time that the standby pay provisions were added to the Compensation Agreement at which time the Department indicated that only apparatus and communications employees would be subject to standby; and 2) by the Department's actions in declining to implement its planned introduction of standby to EMT personnel in 1988 following the Union's assertion that the side agreement precluded such action. Second, the decision of the interest arbitration surrounding the most recent working conditions agreement included a dispute over the scope of proposed "zipper" clauses. In adopting the current contractual zipper clause, Arbitrator Marvin Johnson relied upon the fact that the zipper clause he was adopting for inclusion in the working conditions Agreement, did not operate to waive the Union's right to bargain over changes in pre-existing conditions which were covered by the obligation to bargain under the CMPA. Although, as noted earlier, work schedules were discussed in detail during the working conditions negotiations, and a detailed Addendum negotiated, there was never any discussion during those negotiations of the issue of standby duty.

The Department was on notice from prior discussions with the Union in 1988 that the Union's position was consistent with the position taken in this case -- that

prior to instituting a standby requirement for emergency health care providers the Department was obligated to bargain both the issue of whether standby duty could be required as well as the issue of the conditions under which it might be accomplished. Despite that notice, the Department elected in this case to unilaterally implement standby upon emergency health care providers without bargaining in good faith over that change. Additionally, the Department's notice also resulted in: a) eliminating employees' rights to apply to their supervisors and to take Unscheduled Annual Leave ("UAL"; b) changing the procedures for obtaining Emergency Annual Leave ("EAL"); and c) changing the process for obtaining sick leave. This unilateral action impacted negatively upon employees, violated the applicable provisions of the DPM and violated the obligation to bargain in good faith imposed by Section 1.618-4 (a)(5) of the CMPA. The Union also asserted that the Department's actions earlier in 1989 in not scheduling any annual leave for pay periods before January 30, 1989 or after December 21, 1989 violated a past practice of scheduling annual leave during all pay periods during the year.

Finally, the Union did not waive its bargaining rights by failing to make a written demand to bargain during the fall of 1989. The Department knew of the Union's desire to bargain and took the position repeatedly that the issue was not one subject to the obligation to bargain. Surely, there was no clear and unmistakable waiver of the obligation to bargain in good faith in this case.

For all these reasons, the Board is urged to uphold the Complaint in its entirety. In view of the passage of time, the Union does not seek a status quo ante order, but does seek an order directing the Department to bargain in good faith with the Union, even if mid-term, over changes to conditions of employment, including specifically proposed changes over the imposition and implementation of standby duty and usage of annual and emergency leave.

CONTENTIONS OF THE DEPARTMENT

Timeliness

The Board has strictly applied the 90 day time limit contained in its Interim Rules in prior cases. No reason has been shown to vary that approach in this case.

In Members of AFGE, Local 631 v. AFGE, Local 631, PERB Case No. 88-U-07, Opinion No. 230 (1989) the Board dismissed as untimely a Complaint based upon conduct taking place between 1982 and 1986 which was filed on November 5, 1987.

In AFSCME Local 1033 and District of Columbia General Hospital, PERB Case No. 86-U-04, Opinion No. 149 (1987), the

Complaint was filed on the 90th day, but lacked sufficient copies as required by the Board's regulations. When a corrected filing was made 7 days later with the proper number of copies, it was dismissed as having been untimely filed.

The Union's claim of a continuing violation must be rejected. There was no continuing violation in this case. The unrebutted facts demonstrated that the Department advised the bargaining unit clearly and unequivocally on November 9, 1989 of the standby requirements and procedures for handling emergency annual leave requests on the upcoming holiday periods. No additional action was taken by the Department, other than the reposting of the memorandum -- which was done at the request of the Union. The December 8, 1989 erroneous notice and the issuance of the December 11, 1989 corrected notice did not start the clock running anew. It was nothing more than a reminder of the previously published policy. The gravamen of the Complaint -- that the memorandum was published without prior bargaining in good faith -- had already been completed on November 9, 1989. The Union should not be allowed to creatively add new arguments regarding the conduct complained of in order to attempt to circumvent the 90 day filing requirement and the determination by the Executive Secretary that the matter is time barred.

The Union's claim of equitable tolling also should be rejected. First, the Board's Rules make no provision for equitable tolling. Moreover, the Union's claim regarding tolling makes no sense. Why would a purported statement by Mr. Cavenagh -- a statement which he credibly denied -- that he would rescind an outdated memorandum lead the Union to delay filing an unfair labor practice Complaint which it had already stated it was going to file? Nor was Mr. Haupt able to explain why he would have delayed for an additional seven weeks after this alleged commitment to rescind the memorandum and then suddenly filed the instant Complaint.

For all these reasons, the Complaint should be dismissed, with prejudice, as time-barred.

Jurisdiction to Hear Claims of Breach of Contract and Law, Rule and Regulation

A number of Board decisions make clear that, to the extent that the Union's claim is based upon an assertion that the Department violated the Compensation Agreement or Working Conditions Agreement, that issue is solely one for the grievance and arbitration process and should not be decided ab initio by the Board. Violations of the negotiated Agreements are not per se unfair labor practice charges litigable before the Board. See Fraternal Order of Police and Metropolitan Police Department, PERB Case No. 84-U-01, Opinion No. 72 (MPD offered to waive time limitations

and to process a grievance on question of whether challenged bulletin board notice violated contractual provisions regarding posting of particular materials on bulletin boards and whether individual officer's rights to union representation or to refrain from having union activities interfered with were violated; Board concluded that deferral of the ULP Complaint was proper pending outcome of the arbitration process with limited, Spielberg type review thereafter; both Parties were directed by the Board to proceed through the grievance and arbitration process despite the failure of the FOP to have grieved the matter previously); AFGE Local 1550 and D.C. Department of Corrections, PERB Case No. 83-U-03, Opinion No. 59 (dismissing Complaint that Department violated the CMPA by treating various grievances as abandoned or resolved pursuant to its interpretation of the terms of the contractual grievance procedure; finding that any dispute related solely to contractual and not statutory rights); Forbes and IBT, Local 1714 and Joint Council 55, PERB Case No. 87-U-11, Opinion No. 205 (dismissing ULP Complaint alleging that Union's breach of collective bargaining agreement also constituted an unfair labor practice under the CMPA; concluding that "whether such acts [the distribution of various union literature during roll call"] do in fact violate the collective bargaining agreement is a matter not within our jurisdiction"; Board further stating that "Under the CMPA, breach of a contract does not constitute a per se statutory violation"; also rejecting allegation that the presence of union representatives at roll call interfered, coerced or restrained employees in the exercise of their CMPA guaranteed rights); FOP and Barry, PERB Case No. 83-U-14, Opinion No. 68 (dismissing Complaint for lack of jurisdiction which challenged the Mayor's issuance of reprimands based upon Civilian Complaint Review Board findings on the basis that the Civilian Complaint Review Board Act vested exclusive authority to resolve those controversies in the CCRB and the Mayor); and Green and District of Columbia Department of Corrections, PERB Case No. 89-U-10, Opinion No. 257 (1990) (dismissing for want of jurisdiction assertion by the Complainant that various contractual rights were violated).

The essence of these decisions is that where the parties have negotiated a broad scope grievance and arbitration provision, as the Parties have done in this case, then that grievance and arbitration mechanism is the exclusive process for adjudicating claims of breach of the Agreement or the DPM. The Department does not challenge the Board's jurisdiction to resolve the issue of the failure to negotiate standby duty. As to all of the Union's other allegations, the Board is not the proper forum to resolve those claims and they should be dismissed as outside of the Board's limited jurisdiction.

The Merits

The Department did not cancel leave during the Christmas and New Year's holiday periods in violation of the law. The unrebutted record evidence was that no employees were scheduled to be on annual leave during those periods. Since the Department canceled no leave, the question of the legality of any such cancellation is not properly presented in this case.

The Department did not violate the CMPA by failing to schedule annual leave during the last 10 days of 1989. Nothing in the law mandates scheduling annual leave over all of the days of the year. Further, that action by the Department was announced in late January, 1989, and was not challenged by the Union. Thus, procedurally, it is untimely. It also was not even addressed in the Complaint.

Thus, for procedural and merits reasons, this allegation must be dismissed.

The Union never sought to negotiate regarding the portions of EAB 89-23 which focused upon the procedures for granting unscheduled annual leave and emergency annual leave. The record evidence, viewed as a whole, supports the Department's claim that the only items which the Union objected to at the November 3, 1989 meeting were the sick leave portions of the draft memorandum -- which the Department removed in the face of the Union's opposition -- and the resort to standby duty. Absent receipt of a timely Union request to bargain over those items, the Department cannot be found to have violated the duty to bargain in good faith relative to the other aspects of the memorandum. Nor was there evidence that the Parties had previously negotiated over leave procedures. Rather, the Department operates under the provisions of the DPM and, as noted earlier, any alleged violation of the DPM must be asserted in another forum. Moreover, if the Board considers the matter, the Department submits that the DPM vests considerable discretion in the Department regarding procedures and that the agency head has the authority under the DPM to delegate authority to approve leave to appropriate management officials. The DPM also contains provisions relative to the maintenance of essential minimum public services, which the Department maintains applied to this situation. Further, the Department was not shown to have improperly denied any request to take unscheduled annual leave or emergency annual leave. The Department was simply acting to ensure adequate staffing levels at a time of year when staffing problems historically have been exacerbated by large numbers of employees desiring to be off from work.

The Department was not obligated to negotiate with the Union prior to placing employees on standby duty. The testimony of Mr. Haupt and Mr. Fishburne, as well as that of

Mr. Mott, clearly revealed that no explicit demand was made by the Union to bargain over the placement of operations employees on standby in 1989. Absent such a demand, the CMPA imposed no obligation upon the Department to negotiate in good faith with the Union. To hold otherwise would require management to suspend indefinitely implementation of any policy changes while awaiting a demand from the Union to negotiate.

Moreover, the Parties had previously agreed to standby duty provisions in the Compensation Agreement negotiations which recognized the right of management to designate employees who would be placed on standby duty and which mandated certain wage payments, depending upon the circumstances, and mandated that the work schedule of employees on standby status reflect that time. Nothing in the Compensation Agreement or the side negotiations limited the application of the standby duty provisions of that Agreement to specific groups of employees in the bargaining unit. The testimony of Mr. James was not supported by the terms of the November 14, 1984 memorandum from Mr. Weinberg to then Chief Coleman. That memorandum, which was drafted by Mr. Levitt, did not address the question of excluding any persons from coverage of the negotiated standby duty language and no such intention was shown to have been held by either the sender or the recipient of that memorandum. Moreover, the normal custom of the parties is to execute side letters or Memoranda of Understanding to memorialize special terms. No such mutually signed document exists in this case.

The Union's contention must be rejected that simply because the decision to place an employee or group of employees on standby duty impacts upon working conditions, management is obligated to bargain first prior to implementing such a decision. The District routinely places employees on standby duty and removes other employees from standby duty. There was no evidence that the District bargains with the appropriate local union in each such case or that any unfair labor practice Complaint has been filed regarding such failures to bargain. Even without an agreement relative to standby duty, the right to assign employees to positions and to work is a management right recognized by Section 1.618.8 (a). This management right is bolstered by the language of the Compensation Agreement which "requires" employees to be on standby at the direction of management.

Further, the EAB has long assigned apparatus employees to standby duty. Nothing in the working conditions agreement compels the treatment of the apparatus employees and the operations employees differently vis-a-vis the question of standby duty. Surely, if such disparate treatment were intended, it would have been reflected in the language of the Agreement.

For all these reasons, the Board should conclude that the Complaint be dismissed as time-barred; that if not time-barred, the Complaint should be limited to the issue of whether the Department was obligated to bargain in good faith prior to placing operations employees on standby duty; and that, on the merits of that claim, find that the Union has failed to sustain its burden of proving that a breach of the CMPA occurred in this case.

REPORT AND RECOMMENDATIONS

The threshold issue is whether the Complaint in this case was timely filed. Section 103.1 of the PERB's Interim Rules provided in pertinent part that:

> A complaint filed by an agency or a labor organization in its own name or by a labor organization in the name of an individual must be filed within ninety (90) days of the alleged violation.

The Complaint, as drafted, complained: 1) that the EAB's refusal to bargain prior to promulgating EAB Memorandum 89-23 which was issued on November 9, 1989, and 2) that the issuance and implementation of EAB Memorandum 89-23 violated the Parties' Agreement, and particularly the Addendum which addressed work schedules. The timeliness analysis applied to these two types of refusal to bargain allegations varies. Accordingly, they are addressed separately.

I am clearly persuaded that the claim that the EAB's refusal to bargain prior to issuing EAB Memorandum 89-23 on November 9, 1989 violated the obligation to bargain in good faith is time-barred since the Complaint alleging this statutory violation was not filed until more than 90 days after the alleged violation. The Union has relied upon several arguments to assert that the time for the filing of the Complaint should run from some date later than November 9th -- i.e., either on the date of implementation of the policy changes described in the memorandum or be treated as a continuing violation which could be asserted at any time and with the 90 day period acting only as a limit upon any remedy which might be directed by the Board.

The vitality of the "continuing violation" theory, as set forth in the cases cited by the Respondent, must be deemed subject to some question in light of the series of recent NLRB decisions addressing the proper interpretation of the Section 10(b) limitations period and judicial decisions in the equal employment area interpreting and applying the filing deadlines of Title VII of the Civil Rights Act. Prior to applying this theory to the facts of the instant case, some review of recent Board and court decisions in this area appears appropriate.

In a series of recent decisions, the NLRB has narrowed rather substantially its "continuing violation" theory for purposes of application of the six-month Section 10(b) limitations period of the NLRA. In the most recent of these decisions, A & L Underground, 302 NLRB No. 76, 137 LRRM 1033 (1991) (2 to 1 decision), the Board concluded that in cases involving a total repudiation of the collective bargaining agreement by an employer, the time period for filing a ULP charge began to run as of the date that the union first had clear notice of that repudiation. The Board majority rejected the continuing violation theory in that situation and found that the policies underlying the Section 10(b) limitations period were furthered by dismissal of a charge which was filed 8 1/2 months after the date on which the union first had actual notice of the employer's repudiation of the agreement, even though the agreement arguably had not yet expired. According to the majority in A & L:

> Second, the continuing violation theory impairs the adjudication process because it permits litigation of distant events. . . . Thus, the interest of ensuring fairness and just results in our adjudications warrants our rejection of the continuing violation approach in cases of this kind.
>
> We, of course, retain an important protection for the victims of unlawful contract repudiations, as in the case of those injured by any unfair labor practice. We adhere to the Board's long-settled rule that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. . . . Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and equivocal notice of the violation rests on the respondent. Thus, by requiring that a party promptly file a contract repudiation charge, we are not placing any hardship on the party challenging the repudiation. The only parties against whom the bar might be a hardship -- those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party -- are not barred by our holding.
>
> Once a party has notice of a clear and unequivocal contract repudiation, however, a dispute is clearly drawn. Indeed, it is at the moment of the repudiation that the unfair labor practice -- the refusal to bargain -- fundamentally occurs; and the legality of the repudiating party's refusal depends on the evidence that the parties muster as to the

> repudiator's right to take that action at that time. Thus, we do not agree with our dissenting colleague's contention that this case fits within the "first category" of cases referred to in Bryan Mfg., in which Section 10(b) would not be a bar -- those in which "occurrences within the six month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices." 362 U.S. at 416-417. Cases falling into that category would include cases in which a respondent has not given clear notice of a total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contractual terms and conditions of employment.

137 LRRM at 1035.

NLRB Member Devaney, dissenting in A & L, would have found the violation timely filed because it could be proved without reliance upon any events which took place outside the Section 10(b) limitations period. According to Member Devaney, the failure to apply the terms of a collective bargaining agreement during a period in which it was validly in effect constituted a breach of Section 8(a)(5) of the NLRA and that continuing breach should be cognizable by the Board for the six month period predating the filing of the charge.

In Chemung Contracting Corporation, 291 NLRB No. 123, 129 LRRM 1305 (1988), the Board found a claim that an employer had made unilateral changes by failing to continue to make contributions into a benefit fund to be time-barred. In Chemung, the employer ceased making contributions during the course of a strike which followed the expiration of its collective bargaining agreement. The Board found that the initial cessation took place more than six months prior to the filing of the charge and that the continued failure to make contributions could not be found unlawful, in and of itself, without first litigating the issue of whether the initial cessation was proper. The Board specifically rejected the theory that each new failure to make payments was a "separate violation" and distinguished the situation in which a contract remained in full force requiring the making of those contributions.

In Hoover Enterprises, 293 NLRB No. 78, 131 LRRM 1057 (1989), the Board found a charge time-barred which complained that a refusal to execute in writing an agreement constituted a refusal to bargain in good faith. The Board specifically rejected the validity of the continuing violation theory in cases of this type, overruling a prior line of precedent to the contrary.

All of these Board decisions interpreted the decision of the United States Supreme Court in Local Lodge No. 1424, Machinists v. NLRB, 362 U.S. 411 (1960) (referred to by the Board as the "Bryan" case since the employer involved was Bryan Manufacturing Company and the initial Board decision bore that caption). In Bryan, a charge was filed 10 months after the execution of a labor agreement. The charge alleged that continued enforcement of that agreement was an unfair labor practice on the basis of a claim that when the agreement (which contained a union security provision) was executed the union did not represent a majority of the employees in the bargaining unit. The United States Supreme Court rejected the Board's application of the "continuing violation" theory to that situation, stating that:

> . . . Conceding that a complaint predicated on the execution of the agreement here challenged was barred by limitations, the Board contends that its complaint was nonetheless timely since it was "based upon" the parties' continued enforcement, within the period of limitations, of the union security clause. It then said that even though the former was itself time-barred, the unlawful execution of the agreement was nevertheless "relevant in determining whether conduct within the 6-month period was unlawful," 119 N.L.R.B. at 504; and that evidence as to it was admissible because section 10(b) is a statute of limitations, and not a rule of evidence.
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> . . .
>
> It is doubtless true that section 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather,

> it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.
>
> The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. . . .

(362 U.S. at 415-17; underscoring in original)

In discussing the doctrine of "continuing violation" the Supreme Court stated:

> The applicability of these principles cannot be avoided here by invoking the doctrine of continuing violation. It may be conceded that the continued enforcement, as well as the execution, of this collective bargaining agreement constitutes an unfair labor practice, and that these are two logically separate violations, independent in the sense that they can be described in discrete terms. Nevertheless, the vice in the enforcement of this agreement is manifestly not independent of the legality of its execution, as would be the case, for example, with an agreement invalid on its face or with one validly executed, but unlawfully administered. . . . In any real sense, then, the complaints in this case are "based upon" the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the section 10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement.

(Id. at 422-23; underscoring in original).

In Delaware State College v. Ricks, 449 U.S. 250 (1980), the United States Supreme Court determined that the date for the filing of a Title VII charge began to run on the date that a university notified a faculty member that he

would not be granted tenure, not on the date approximately one year later when the professor's employment was actually terminated. The Court concluded, reversing the holding of the Court of Appeals on this point, that the complaint alleged that the denial of tenure, not the termination of employment was for discriminatory reasons; that the time period for measuring the limitations periods of Title VII and Section 1981 thus began on the date that the tenure denial letter was issued to the employee; and that the possibility that the employer might change its position and not terminate the employee provided no grounds for extending the date on which the alleged act of discrimination took place. The termination was viewed by the Court, not as an independent act of discrimination by the College, but as merely the effect of the prior allegedly illegal act of denying the employee tenure. The Court also held that the fact that the College provided a grievance procedure, which Ricks utilized, did not operate to alter the date on which he was deemed to have been denied tenure.

None of the decisions of the PERB cited by the Parties revealed whether the PERB has taken any position on the manner in which it intends to interpret the time limits provisions contained in its own Rules. The PERB recently has stated, however, that it would give substantial consideration to relevant NLRB case law. (Opinion No. 249)

Applying the NLRB and Supreme Court decisions to the facts of this case, I am persuaded that the Union was on clear notice no later than November 9, 1989 of the Bureau's position that it would not bargain about the decision to require operations personnel to work on standby duty during the three holiday periods in question. The Union knew by that date: 1) the precise terms of the method by which the Bureau planned to implement these changes in working conditions -- it was set forth in the final posted version of EAB Memorandum 89-23; and 2) the degree to which the Bureau was willing to discuss and negotiate about the issues contained in the Memorandum -- the Parties had met on or about November 3, 1989 and discussed the issues covered by that Memorandum in some detail. It is not necessary to analyze whether the discussions held on November 3, 1989 were sufficient to satisfy the obligation to bargain imposed upon the Bureau by the CMPA. Even if one assumes that the Bureau acted without previously bargaining in good faith when it promulgated and posted EAB Memorandum 89-23, that refusal to bargain claim was complete as of November 9, 1989.

The reposting of the notice on December 8, 1989, and December 11, 1989 cannot serve to extend or resurrect the time period for challenging the posting of EAB Memorandum 89-23. The reposting was done purely as a matter of reminder and at the suggestion of the Union. The December 8th version -- which was identical in relevant part

to the draft memorandum -- was posted in error and, when the matter was brought to Mr. Mott's attention, was corrected immediately. The December 11th memorandum contained nothing which was not already included in the November 8, 1989 memorandum and the only deleted portions related to the Thanksgiving holiday period -- which had already passed.

The claimed refusal to bargain prior to posting the Memorandum and prior to issuing a policy covering an area not regulated by the terms of the Parties' Agreement (and the related assertion that such unilateral action was in derogation of the Union's status as the exclusive bargaining representative) was thus complete as of November 9, 1989. The eventual implementation of that policy was irrelevant to the issue of whether the Bureau bargained in good faith prior to promulgating and announcing that policy change. I am persuaded that the teachings of the Supreme Court in Bryan and Ricks, as well as the recent holdings of the NLRB, support this approach.

There was no repetition by the Union after November 9th and prior to implementation of the policy of any request to bargain about that matter. In fact, the record in this case fails to support the Union's claim that a specific demand was ever made to bargain about the substance of EAB Memorandum 89-23; rather, the Union's position was repeatedly not that it wished to bargain about the terms of that Memorandum, but that: 1) it had already bargained about work schedules and the Bureau was in violation of the Agreement by implementing standby duty; and 2) the proposed limitations upon the granting of leave was violative of the applicable provisions of the DPM.

The Union's claim that the alleged promises by Mr. Cavenagh to rescind EAB Memorandum 89-23 provided grounds to equitably toll the 90 day limitations period contained in PERB Interim Rule 103.1 is rejected. First, the record failed to sustain the Union's claim that Mr. Cavenagh ever promised to rescind EAB Memorandum 89-23. His denial was credible and the Union bears the burden of proof on this factual claim. Second, I am persuaded that any confusion harbored by Mr. Haupt on this point may well have been the result of the agreement to withdraw the erroneously issued December 8, 1989 memorandum. This was done by the Bureau. The issuance of the December 11, 1989 memorandum, in the circumstances of this case, corrected the situation. No formal notice of rescission of the December 8, 1989 memorandum was required. The Union simply could not have reasonably relied upon the issuance and removal of the December 8, 1989 memorandum as a basis for believing that the time limits for filing a Complaint should be extended.

In sum, no reasons were shown on this record which would warrant application of the principle of equitable tolling in this case.

For all these reasons, I am persuaded that the allegations of the Complaint which were grounded in the failure or refusal of the Bureau to bargain with the Union prior to promulgating and posting EAB Memorandum 89-23 must be rejected as time-barred and do not fall within the confines of the "continuing violation" doctrine.

The second basis of the refusal to bargain claim -- that the actions of the Bureau were violative of the Parties' Agreement -- stands in a somewhat different position. This alleged violation of the CMPA is grounded not upon the failure of the Bureau to meet and negotiate about the changes -- all of which took place more than 90 days prior to the filing of the Complaint -- but upon a claim that, during the term of the Agreement, the Bureau violated the terms of that negotiated Agreement and that the alleged patent contractual breach violates Section 1-618.4 (a)(5), and derivatively Section 1-618.4(a)(1), of the CMPA.

Initially, it must be noted that this "refusal to bargain" claim was clearly set forth in the Complaint itself and thus must be viewed as presented herein for determination. The claimed conflict with the Agreement did not ripen until the dates on which the Bureau actually implemented the standby duty and leave provisions of EAB Memorandum 89-23. The statement by the Bureau that it intended to act allegedly in derogation of the Parties' contractual bargain is not the date on which this second type of refusal to bargain violation would occur. The claim that the Bureau's actions were in patent breach of its contractual obligation can be "proved" without resort to an examination of the Parties' actions outside the 90 day limitations period. All that would be needed would be proof that the Bureau took action not agreed to or condoned by the Union and that the action taken was violative of the Bureau's contractual obligations. This result is particularly appropriate given the unrebutted record evidence that the Bureau had made similar announcements regarding standby duty in 1988 on two occasions, posted notices, and then failed to implement those notices. In regard to the Union's claims of contractual breach/refusal to bargain, it cannot be concluded that the Union was on "clear and unequivocal notice" that the Bureau would actually implement EAB Memorandum 89-23, given the Bureau's prior track record in regard to not implementing similar prior notices, until November 22, 1989, when the Memorandum was actually implemented. (The 90 day period from February 20, 1990 would end on November 23, 1989.) Further, this type of alleged refusal to bargain violation would appear to be a "continuing" type of violation, even under Bryan and the recent NLRB decisions cited above.

For all of these reasons, I am persuaded that this second type of refusal to bargain claim cannot be dismissed on timeliness grounds. There are, however, other reasons as

to why this "refusal to bargain/contract breach" claimed unfair labor practice cannot be determined by the Board on its merits.

The prior decisions of the PERB suggest that: 1) the PERB takes the position that claims of contractual breach are best resolved by the Parties' contractual dispute resolution machinery in cases where that machinery terminates in binding arbitration; 2) the PERB has concluded that the Parties' contractual dispute resolution machinery is undermined by the PERB's deciding issues of contractual interpretation ab initio, and that, accordingly, exhaustion of the grievance and arbitration process will generally be required in unfair labor practice cases dependent upon establishing disputed alleged breaches of collective bargaining agreements; 3) that the PERB has deferred the processing of unfair labor practices which are based upon claimed breaches of collective bargaining agreements, even in cases where the Parties have not initiated the negotiated grievance process, electing instead to direct that the Parties pursue the matter through the grievance and arbitration procedure, with the PERB retaining limited Spielberg type review jurisdiction over the arbitration award (Opinion No. 72); and 4) the PERB has also determined that dismissal of the Complaint, rather than Collyer/Spielberg type deferral is appropriate for cases alleging a violation of the CMPA by the alleged refusal to honor the provisions of a negotiated agreement (Opinion Nos. 59 and 205). (The decision of the Board in Opinion No. 257 is distinguishable since it involved a question of an individual attempting to litigate claims of contractual breach before the PERB. It is well established that individual employees lack standing to assert a claim that the good faith bargaining rights of the exclusive representative have been violated.)

Given the difference of approach contained in the PERB's prior cases, I am persuaded that the preferable course in this case is to defer processing of this Complaint on the merits, to direct that the Parties process the Union's claims of contractual breach through the grievance and arbitration process, and to retain limited jurisdiction in this case in accordance with the Spielberg approach, rather than to dismiss those claims entirely on the basis of a finding that the Union has lost those rights by resorting to the wrong forum to have those claims adjudicated. I recognize that Opinion No. 72 is distinguishable factually in that therein the union sought to avoid arbitration, but the agency agreed to go to arbitration and to waive the time limits, whereas in the instant case both Parties are arguing that they did not wish to pursue the grievance and arbitration process. The union's failure to agree to pursue arbitration of its claims in Opinion No. 72 impliedly was held not to waive the union's right to have its claims heard in that forum; if a waiver took place by the union's having failed to initiate a grievance and pursue arbitration, then the

Board presumably would not have directed arbitration of the matter, notwithstanding the agency's agreement to proceed in that case to arbitration. The failure of the Bureau in this case to agree to arbitrate the Union's claims of contractual breach may well provide a basis for finding that it has not waived any timeliness objection at the arbitration stage to an arbitral resolution of the merits. The determination as to such an issue, however, is more appropriate for resolution in the arbitration process than for the Board ab initio, since it too involves an issue of the proper interpretation and application of the language of the Parties' Agreement. Moreover, an approach which preserves the timeliness issue for arbitration will avoid a situation in which a party resurrects a potentially stale grievance claim by filing a timely unfair labor practice Complaint, thus using the Board's 90 day provisions to avoid the application of a possibly shorter contractually agreed upon time period for filing a grievance regarding a particular alleged contract breach.

For all these reasons, I am persuaded that: 1) the claim that the Respondent violated the CMPA by having failed to negotiate in good faith with the Union prior to promulgating and issuing EAB Memorandum 89-23 is dismissed; and 2) the claim that Respondent violated the duty to bargain in good faith imposed by the CMPA by breaching the Agreement when it imposed mandatory standby duty and placed new limitations and procedures upon the receipt of unscheduled annual leave and emergency annual leave for the periods of November 23 to 24, 1989, December 22 to 26, 1989, and December 29, 1989 to January 2, 1990, is deferred to the grievance and arbitration procedures of the Parties' Agreement for resolution, with the Board retaining jurisdiction over the matter for possible limited Spielberg type review of the outcome of that process. The Hearing Examiner recognizes that the result of this holding is to allow an already old dispute to continue. The resolution of the underlying claims of contractual breach cannot proceed, however, without violating the PERB's own prior decisions as to its role and the role of the negotiated grievance and arbitration mechanisms in determining claims of contractual breach. Of course, nothing herein is intended to preclude the Parties from determining jointly that they no longer wish to continue to pursue this more than two year old dispute further. In such an eventuality, the Board will dismiss the remaining allegations of the Complaint since, absent a finding of contractual breach, no finding may be made that the Respondent's implementation of the policies described in EAB Memorandum 89-23 violated the CMPA in any respect.

ORDER

The allegation that the Respondent violated the CMPA by its promulgation and issuance of EAB Memorandum 89-23 on November 9, 1989 is dismissed on timeliness grounds.

The allegation that the Respondent violated the CMPA by patently breaching its contractual obligations when it unilaterally placed bargaining unit employees on standby duty and imposed new limitations/procedures on the taking of unscheduled annual leave and emergency annual leave for the periods of November 23 to 24, 1989, December 22 to 26, 1989, and December 29, 1989 to January 2, 1990, is deferred to the grievance and arbitration procedures of the Parties' Agreement for resolution. The Parties are directed to process these claims of the Union through the contractual grievance and arbitration mechanism. The Board will retain jurisdiction over the matter for possible limited Spielberg type review of the outcome of that process.

June 17, 1991

Ira F. Jaffe, Esq.
Hearing Examiner