GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 36,	PERB Case No. 00-U-28
Complainant,	Opinion No. 696
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF FIRE AND EMERGENCY MEDICAL SERVICES,	
Respondent.	

DECISION AND ORDER

This matter involves an Unfair Labor Practice Complaint filed by the International Association of Firefighters, Local 36 ("Complainant", "IAFF" or "Union") against the D.C. Department of Fire and Emergency Medical Services (" Respondent, "FEMS" or "Agency"). The Complainant contends that FEMS violated D.C. Code §1-617.04(a)(1[1]) and (a)(5) (2001ed.) by failing to engage in compensation bargaining with IAFF prior to the budget mark up period for FY2001.[2] IAFF argues that because of the delay, *inter alia,* its firefighters were denied a pay

[1]Specifically, IAFF alleges that FEMS interfered with and coerced employees in the exercise of their statutory rights in violation of D.C. Code §1-617.04(a)(1) (2001 ed.), by failing to engage in compensation bargaining with the Union.

In addition, IAFF alleges that FEMS violated D.C. Code §1-617.04(5) (2001 ed.) and the duty to bargain in good faith by these same acts.

[2] In their complaint, IAFF asserts that the Union originally requested to bargain with the Agency on December 7, 1999. However, the Union did not have their first bargaining session until March 27, 2000. Additionally, IAFF argues that this delay in meeting until March 27,

(continued...)

increase.[3]

The Respondent denies the allegations. First, FEMS asserts that IAFF's complaint should be dismissed because it was not timely filed.[4] In addition, FEMS claims that the time period between the initial request to bargain and the time that the parties met was not unreasonable. Furthermore, the Agency contends that any delay which occurred was caused by a change in administration at the Office of Labor Relations and Collective Bargaining (OLRCB) during this time period.[5] Finally, OLRCB argues that the allegations made in IAFF's complaint are *moot* because the parties *did* eventually negotiate until they reached an impasse.

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[2](...continued)
2000, when budget mark up period had ended, negatively affected its members. This was the case because no money was budgeted for firefighters' pay increases. As a result, IAFF contends that FEMS's delay was an effective refusal to bargain and a violation of the duty to bargain in good faith. IAFF relies on J.H. Rutter-Rex Mfg. Co. to support is position that the refusal to bargain does not necessarily require some affirmative negative act, nor does it require a deliberate scheme to cause delay. 86 NLRB 470 (1949). It is sufficient that the employer simply fails to " make expeditious and prompt arrangements within reason for meeting and conferring." Id. IAFF also relies on the Little Rock Downtowner, Inc. case to support its position that the refusal to meet with the Union, despite repeated requests to come to the bargaining table, adequately meets the threshold for being considered a violation of the duty to come to the table. See, 145 NLRB 1286, 1305 (1964).

[3]A major issue in these negotiations was a pay increase for firefighters. IAFF alleges that the last compensation agreement which was negotiated between the parties expired in 1995. In addition, IAFF argued that the last pay increase that the firefighters received in 1998, occurred not as a result of negotiation, but as a result of the Union's fight to be included in federal legislation requiring a pay increase for firefighters. (Complaint at p.3).

[4] Board Rule 520.4 requires that an unfair labor practice complaint be filed "not later than 120 days after the date on which the alleged violations occurred." FEMS, through its representative, the Office of Labor Relations and Collective Bargaining (OLRCB), contends that IAFF's complaint is untimely because it was filed more than 120 days after December 7, 1999, the date of IAFF's first bargaining request.

[5] OLRCB alleges that the delay in bargaining was caused by a change in their office's administration. Mary Leary had recently been hired as the Director of OLRCB in May of 2000, and requested additional time to review the matter before commencing compensation bargaining with the Union. James Baxter was the Director of OLRCB when the request for bargaining was originally made.

A hearing was held, and the Hearing Examiner issued a Report and Recommendation (Report). In her Report, the Hearing Examiner found that: (1) the Complaint *was* timely and (2) FEMS had committed an unfair labor practice by delaying the start of negotiations past the budget mark up period. As a result, the Hearing Examiner concluded that the Respondent had violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed).

In reaching her decision, the Hearing Examiner looked at the "overall conduct of the parties"[6] in order to see whether there had been a violation of the duty to bargain in good faith. D.C. Code §1-617.01 (2001 ed.), requires that the Mayor or appropriate personnel authority shall meet at reasonable times with exclusive employee representatives to bargain collectively in good faith. What is sufficient to constitute good faith will depend on the diverse facts of each specific case. See, National Labor Relations Board v. American National Insurance Co. , 343 U.S. 395; 72 S. Ct. 824, 30 L.R.R.M. (1952). A statutory standard such as "good faith" can have meaning only in its application to the particular facts of a particular case. See, National Labor Relations Board v. American National Insurance Co., 343 U.S. 395; 72 S. Ct. 824, 30 L.R.R.M. (1952).

In view of the above, the Hearing Examiner determined that the Respondent had a duty to make prompt and reasonable efforts to confer with the Union, but failed to do so. In addition, she found that a 3-month lapse of time between the initial request to bargain in December 1999, and the first meeting date of March 27, 2000, was unreasonable[7]. On these facts, the Hearing Examiner concluded that because of the delay in bargaining, IAFF had "in effect been shut out of the budget process during the time that funds were being made available for other similarly situated workers." (Report at p. 20). " Thus, the Complainant is being forced to seek an increase retroactively from funds that were not reserved for them in the City's Budget when the City Council went through the budget process." (Report at p. 20). The Hearing Examiner also considered the fact that the Agency met with the Union on March 27, 2000 and agreed to participate in expedited interested based bargaining. Then subsequently, on April 5, 2000, the Agency withdrew its offer to bargain.[8]

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[6]The NLRB has held that the finder of fact must review the parties' overall conduct to determine whether the parties bargained in good faith. See also NLRB v. Fitzgerald Mills Corp.,133 NLRB 877, enforced, 313 F2d 260 (2nd Cir. 1963), cert. den., 375 U.S. 834 (1963).

[7] In her report, the Hearing Examiner stated that "given the totality of circumstances, this (March 27th meeting date) was a very late response, especially in light of the fact that the budget was supposed to be submitted in April. " (Report at p. 17).

[8]Evidence in the record indicates that OLRCB Director James Baxter advised the Union that District of Columbia officials would not approve or authorize OLRCB to come to the table and bargain over the compensation issue. In making her finding, the Hearing Examiner noted the testimony of the Union's chief negotiator, Jeremiah Collins, who indicated that Baxter had contacted him and told him that OLRCB was instructed not to bargain with IAFF at that time

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Finally, the Hearing Examiner found that " the fact that the Respondent subsequently bargained to impasse with the Union does not negate the validity of Complainant's claim or moot the compensation issue." (Report at p.20). Based on the foregoing, the Hearing Examiner concluded that the Respondent's refusal to come to the table in a timely manner was a refusal to bargain in good faith, and thus, an unfair labor practice in violation of the Comprehensive Merit Personnel Act (CMPA).

IAFF filed no Exceptions concerning the Hearing Examiner's finding that the Agency violated the duty to bargain in good faith; however, FEMS did. In its Exceptions, FEMS asserted that the Hearing Examiner erred in finding that it violated the duty to bargain in good faith. The Agency argued, *inter alia:* (1) that the time delay between the initial request and the initial bargaining session was *not* unreasonable; (2) that the Hearing Examiner impermissibly considered evidence of the parties' prior bargaining history in 1997 and 1998; and (3) that the Hearing Examiner's reliance upon incorrect and unsupported assumptions regarding the District's budgetary process and cycles resulted in an incorrect conclusion.[9] (Exceptions at pgs. 2-4).

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[8](...continued)
and that negotiations would not resume in the "foreseeable future." (Report at p.17).

[9]The Agency also raised a procedural argument concerning a Hearing Examiner's ruling. The Hearing Examiner, over the Agency's objection, allowed Jeremiah Collins, IAFF's Counsel, to also act as a witness and give testimony in a narrative form. (Exception at p. 16). The Agency asserted that this ruling created a "highly unusual and prejudicial" hearing situation and asked that the Board make a clear ruling that a party's representative could not act as a witness in their case. For the reasons discussed below, the Board finds that this Exception has no merit. Under the Board's rules, hearings are investigatory in nature, not adversarial. Hatton v. Fraternal Order of Police Department of Corrections Labor Committee, 47 DCR 769, Slip Op. No. 451, PERB Case No. 95-U-02 (1995) aff'd sub. nom. Fraternal Order of Police Department of Corrections Labor Committee v. PERB, MPD 95-15(1998). To that end, the Hearing Examiner has a responsibility to provide as much information as possible in order to develop a full and factual record upon which the Board can make its decision concerning a case. See, Board Rule 520.11 (Purpose of a Hearing); §550 of the Board's Rules (Hearings); and Pratt v. D.C.Department of Administrative Services, 43 DCR 2943, Slip Op. No. 457, PERB Case No. 95-U-06 (1995)(where the Board held that the Hearing Examiner is authorized to conduct a hearing and assess the probative value of evidence.). The Board's rules give the Hearing Examiner many powers and much latitude to accomplish its mission of developing a full and factual record. See, Board Rules 550.12 and 550.13 (Authority of the Hearing Examiner). Furthermore, the Agency had an opportunity to cross examine Mr. Collins concerning his testimony. As a result, the Board finds that the Agency has not demonstrated how they were prejudiced by the Hearing Examiner's ruling which allowed Mr. Collins to testify. Therefore, the Board declines to make a ruling that party representatives are barred from acting as witnesses.

A review of the record reveals that the Agency 's Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's findings where the findings are fully supported by the record. American Federation of Government Employees 874 v. D. C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. American Federation of Government Employees, Local 2741 v. D. C. Department of Recreation Parks, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999).

After reviewing the record in the present case, we find that the Hearing Examiner's findings are reasonable and supported by the record. The Board's law is clear that an Employer violates the duty to bargain in good faith by unreasonably delaying negotiations over compensation.[10] In addition, the Board has interpreted D.C. Code §1-617.17 (b)[11] to require that the start of compensation bargaining before the conclusion of the fiscal year for which bargaining is sought. International Brotherhood of Teamsters, Local 639 v. D.C. Public Schools, 38 DCR 6698, Slip Op. No. 267, PERB Case No. 90-U-05 (1991). The Hearing Examiner found that the Agency did not decide to begin bargaining with the Union until the fiscal year's budget markup period had almost ended and the fiscal year budget allotments for salary were made. In view of the above, we conclude that the Hearing Examiner's finding that FEMS violated its duty to bargain in good faith is reasonable, supported by the record, and consistent with Board precedent. Where the Hearing Examiner's Report and Recommendation is supported by record evidence, exceptions challenging those findings lack merit. American Federation of Government Employees, Local 2725 v. District

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[10] In International Brotherhood of Teamsters, Local 639 v. D.C. Public Schools, the Board held that delaying compensation bargaining until 89 days after the duty to bargain began was unreasonable. 38 DCR 6698, Slip Op. No. 267, PERB Case No. 90-U-05 (1991) . The duty to bargain in IBT Local 639 v. DCPS began when the compensation bargaining unit had been certified. In view of D.C. Code §1-617.17(m)'s requirement that compensation bargaining between parties begin no later than ninety (90) days after a unit is certified, the Board found that the Employer's delay was deliberate and unreasonable. In the case presently before the Board, the duty to bargain began with IAFF's first request in December 1999. The first bargaining session did not take place until approximately 110 days later. Applying the Board's holding in IBT Local 639 v. DCPS to the facts in the present case, we find that FEMS's delay in bargaining was also unreasonable.

[11] D.C. §1-617.17(b) (2001 ed.) provides, in pertinent part, that: "The Mayor...shall meet with labor organizations which have been authorized to negotiate compensation at reasonable times in advance of the District's budget making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential , premium pay, hours, and other compensation matters."

of Columbia Housing Authority, 45 DCR 4022, Slip Op. No. 544, PERB Case No. 97-U-07 (1998). On this basis, we conclude that the Agency's Exceptions lack merit. Therefore, we adopt the Hearing Examiner's finding that the FEMS committed an unfair labor practice by violating the duty to bargain in good faith.

Since we have adopted the Hearing Examiner's finding that FEMS's violated the CMPA, we now turn to the issue of what is the appropriate remedy. As relief, IAFF seeks an order requiring that: (1) the Department begin bargaining immediately with the Union; (2) any economic improvements negotiated between the parties be retroactive to October 1, 1999; and (3) the Agency pay the Union's attorney' fees in this matter. (Complaint at p. 4).

To remedy this unfair labor practice, the Hearing Examiner recommended that the Board issue an order directing the parties to confer and bargain over the issue of compensation. In addition, the parties were scheduled to participate in interest arbitration at the time of the Hearing Examiner's report. As a result, the Hearing Examiner encouraged the parties to "enter interest arbitration in good faith with the purpose and goal of resolving their compensation dispute to finality."[12] However, the Hearing Examiner did not award any retroactive payment to make up for the Agency's refusal to bargain in 1999, as was requested in IAFF's complaint. The Hearing Examiner also did not address the issue of attorney fees in her Report.

IAFF filed an Exception to the Hearing Examiner's remedy. This Exception challenged the Hearing Examiner's failure to grant the retroactive relief it originally requested in its complaint. However, IAFF later withdrew its Exception. IAFF filed a "Withdrawal of Exception to the Hearing Examiner's Recommended Decision" because the Arbitrator in the Interest Arbitration case between the parties had issued an Award concerning the firefighters' wages, which the D.C. City Council later approved." As a result, IAFF withdrew its Exception and stated that: "in the interest of labor harmony, IAFF has decided not to pursue its request that PERB consider a compensatory remedy in this case." (Withdrawal at p. 2).

When a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. AFSCME Local 2401 and Neal v. D.C. Department of Human Services, 48 DCR 3207, Slip Op. No. 644, and PERB Case No. 98-U-05 (2001); D.C. Code §1-605.02(3) and 1-617.13 (a) (2001 ed.). Moreover, the overriding purpose of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations. Id. In view of the fact that the parties' compensation issues have been resolved through interest arbitration, a decision ordering the parties to bargain over this issue would be *moot*, and would have no therapeutic or remedial effect. Therefore, we limit the Board's remedy to posting a notice indicating that FEMS has committed an unfair labor practice. In addition, we decline to grant IAFF's request for attorney fees because the

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[12]Subsequent to this unfair labor practice complaint being filed, the parties did bargain until they reached impasse. They later participated in an interest arbitration.

Board has held that it lacks authority to grant attorney fees. American Federation of Government Employees, Local 872 v. D.C. Department of Public Works, 49 DCR 1145, Slip Op. No. 439, PERB Case Nos. 94-U-02 and 94-U-08 (1995). We believe that this remedy will achieve the goals of the Board's remedies, as outlined in the CMPA and the above mentioned Board precedent.

Pursuant to D.C. Code §1-605.2(3)(2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and for the reasons discussed above, we adopt the Hearing Examiner's findings and modify the Hearing Examiner's recommended remedy, as noted above.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Fire and Emergency Services (FEMS), its agents and representatives shall cease and desist from violating D.C. Code §1-617.04(a)(1) and (5) (2001 ed.) by refusing to bargain on request concerning compensation with the International Association of Firefighters, Local 36.

2. FEMS shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

3. FEMS shall notify the Public Employee Relations Board (PERB), in writing, within fourteen (14) days from the date of this Order that the Notice has been posted.

4. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

November 26, 2002

PERB Public Employee Relations Board

Government of the District of Columbia

717 14th Street, NW, Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF FIRE AND EMERGENCY SERVICES (FEMS), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 696, PERB CASE NO. 00-U-28 (November 26, 2002).

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

WE WILL cease and desist from refusing to bargain in good faith with the International Association of Firefighters, Local 36 concerning compensation by the conduct set forth in Slip Opinion No. 696.

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

District of Columbia Department of Fire and Services

Date:_____ By_____
Director

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

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

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

November 26, 2002