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

In the Matter of:)	
)	
American Federation of)	
State, County and Municipal Employees,)	
District Council 20, Local 2921, AFL-CIO)	
Complainant,)	PERB Case No. 10-U-49(a)
)	
v.)	Opinion No. 1363
)	
District of Columbia)	
Public Schools,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On August 10, 2010, the American Federation of State, County and Municipal Employees, District Council 20, Local 2921 (“Complainant” or “Union”) filed an Unfair Labor Practice Complaint (“Complaint”) against the District of Columbia Public Schools (“Respondent,” “DCPS,” or “Agency”). The Complainant alleges that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by: (1) failing and refusing to provide relevant information to the Union; (2) unilaterally implementing a new evaluation system; and (3) rating bargaining unit members under the new evaluation system as “ineffective” and terminating those employees. (Complaint at 2-3).

Respondent filed an Answer to the Unfair Labor Practice Complaint (“Answer”), denying the allegations set forth in the Complaint and any violation of the CMPA. (Answer at 2-3). Additionally, Respondent asserted affirmative defenses that DCPS had no duty to bargain with the Union over the evaluation system. (Answer at 3-4). Respondent requested that the Board dismiss the Complaint. (Answer at 4).

On January 28, 2011, DCPS filed Respondent’s Motion to Dismiss Unfair Labor Practice Complaint (“Motion” or “Motion to Dismiss”). Subsequently, on February 8, 2011, Complainant responded to the Motion with Union’s Opposition to Motion to Dismiss and Cross-Motion for Decision on the Pleadings (“Opposition and Cross-Motion”). Thereafter, DCPS

responded to the Opposition and Cross-Motion with Respondent's Reply Motion to Union's Opposition to Motion to Dismiss and Cross-Motion for Decision on the Pleadings ("Reply Motion").

On August 12, 2011, the Board denied the Agency's Motion to Dismiss and denied the Union's Motion for Preliminary Relief. See *American Federation of State, County and Municipal Employees, District Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 59 D.C. Reg. 6526, Slip Op. No. 1111, PERB Case No. 10-U-49 (2012). The Board referred the Complaint to the Hearing Examiner for an expedited hearing. *Id.*

Prior to the hearing, AFSCME's and DCPS's (collectively the "Parties") requested a pre-hearing conference with Hearing Examiner Sean J. Rodgers to discuss stipulations of fact. (Report at 2). On February 1, 2012, the Parties met with the Hearing Examiner. *Id.* The Parties did not believe that there was a dispute over facts, and they agreed to jointly prepare a Stipulation of Fact ("Stipulation") to eliminate a hearing. *Id.* Based on the discussions during the February 2, 2012, pre-hearing conference, the Hearing Examiner directed the Parties by written order ("H.E. Order") to jointly prepare the Stipulations and then, subject to the Hearing Examiner's review of the Stipulations and approval, submit briefs in the nature of closing arguments to the Hearing Examiner. (H.E. Order at 1-2). In addition, absent an agreement on the Stipulation, the Hearing Examiner ordered a hearing to be held on March 21, 2012. (H.E. at 2).

The Parties did not come to an agreement on the Stipulation, and subsequently, a hearing was held on March 21, 2012. The Parties filed post-hearing briefs. At the close of the hearing, the Hearing Examiner issued a Report and Recommendation ("Report") to the Board on August 3, 2012, in which he found that the Union did not meet its burden to prove the Complaint's allegations that the Agency violated D.C. Code § 1-616(a)(1) and (5). (Report at 16). The Hearing Examiner recommended that the Union's Unfair Labor Practice Complaint be dismissed with prejudice. (Report at 24).

On August 14, 2012, the Union filed Exceptions with the Board ("Exceptions"). In response to the Union's Exceptions, on August 29, 2012 ("Opposition"), the Agency filed an Opposition to the Exceptions.

The Union's Exceptions allege that the Hearing Examiner incorrectly dismissed the Complaint because, "(1) the complaint over information was untimely[,] and (2) the Union never demanded bargaining." (Exceptions at 2). Additionally, the Union's Exceptions assert that the Hearing Examiner failed to address the Union's argument "that IMPACT was already a *fait accompli* when the Union learned about it, thereby rendering a demand to bargain unnecessary." *Id.* The Hearing Examiner's Report is before the Board for disposition.

II. Background

At the beginning of the hearing, AFSCME's union representative read into the record the joint stipulations of fact. (Report at 3-4). The Report contained the following joint stipulations:

1. AFSCME is the exclusive bargaining agent of employees of DCPS in a unit described in the collective bargaining agreement consistent with certifications in accordance with DCPS's *Answer to the Complaint*.
2. The collective bargaining agreement expired on September 30, 2007, but has been continued in full force and effect at all times material to this proceeding.
3. On or about a date in late October or early November 2009, DCPS officials, including Peter Weber and Jason Kamras, on behalf of DCPS, met with representatives of AFSCME at DCPS's headquarters to brief AFSCME on a new evaluation system to be used by DCPS, namely IMPACT.
4. Kamras provided an overview of the IMPACT process and solicited feedback from AFSCME regarding IMPACT.
5. DCPS informed AFSCME that the new evaluation system would be used for evaluating and possibly separating DCPS employees.
6. Weber told AFSCME's representatives that DCPS had implemented the IMPACT evaluation system.
7. On or about June 11, 2010, Reichert sent an agenda to Sandra Walker-McLean, the point of contact for then DCPS Deputy-Chancellor Kaya Henderson, in advance of a scheduled June 22, 2010 monthly labor management meeting.
8. Among the items listed on Reichert's agenda was "evaluations at DCPS."
9. DCPS began using the IMPACT evaluation system to evaluate employees beginning on or about September 4, 2009 and each semester since then to the present.
10. DCPS sent notices of termination to certain employees prior to the 2010-2011 and 2011-2012 school years informing them that they had been rated as "ineffective" under the IMPACT evaluation system and that they would be terminated on dates specified in the notices.

(Report at 3-4).

Additionally, the Hearing Examiner found the following relevant facts:

On May 22, 2010, Simon Rodberg, DCPS Manager, IMPACT Design, Office of Human Capital, sent an e-mail to Michael Flood, AFSCME, Local 2921 President, "notifying him that

DCPS had revised IMPACT for the 2010-2011 school year.” (Report at 21). The IMPACT evaluation process was referred by DCPS representatives as “IMPACT 2.0.” *Id.* Further, based on the record, the Hearing Examiner found that “Rodberg advised Flood that DCPS wanted ‘to make sure that you or other AFSCME leadership see drafts of the assessment rubrics for your members before we finalize them;’” and that “Rodberg said he wanted, ‘to set up a meeting in the next couple of week to discuss these drafts.’” *Id.* (citing Ux 1). The Hearing Examiner found that AFSCME did not respond to Mr. Rodberg’s e-mail. *Id.*

Subsequently, a labor management meeting was held between AFSCME and DCPS representatives on June 22, 2010. (Report at 17). “At this meeting, DCPS representatives described the revised IMPACT evaluation process, known as IMPACT 2.0, for school year 2010-2011.” (Report at 17). AFSCME’s representatives included Michael Reichert, Natambu Elshabazz and Michael Flood; and DCPS’s representatives included Peter Weber, Dan McCray, and Simon Rodberg. (Report at 21).

In addition, the Hearing Examiner found that the Parties agreed that, at the June 22, 2010 meeting, “DCPS’s position was that the IMPACT evaluation process and instrument were non-negotiable.” (Report at 21 citing Tr at 30 and at 43-45). “In his testimony, [Mr.] Weber speculated the AFSCME was ‘frustrated’ over the implementation of IMPACT without negotiating.” (Report at 22).

After the June 22, 2010 meeting, communications regarding IMPACT 2.0 continued between the Parties. (Report at 22). “On July 3, 2010, [Mr.] McCray sent [Mr.] Reichert [Mr.] Rodberg’s e-mail notifying [Mr.] Flood of DCPS implementation of IMPACT 2.0.” (Report at 22.) “Reichert responded by referring [Mr.] McCray to [Mr.] Johnson’s appointments scheduler [Ms.] MacIntosh to schedule a meeting with [Mr.] Johnson.” (Report at 22). The Hearing Examiner noted that the record had established that “Johnson” was Geo T. Johnson, AFSCME’s chief negotiator. (Report at 22). Mr. McCray’s responded by e-mail that the Parties could “agree to disagree,” and that DCPS would “meet to discuss” the IMPACT 2.0 implementation and to “let me know available dates.” (Report at 22 citing Ux 1).

On August 10, 2010, AFSCME filed the instant Complaint.

At the close of the hearing, the Hearing Examiner requested and later received IMPACT Guidebooks, which were accepted into the record. (Report at 2-3). On May 2, 2012, except for the submission of post-hearing briefs, the record closed. (Report at 3). The Parties filed post-hearing briefs, which were received by the Hearing Examiner. *Id.* On June 27, 2012, the Hearing Examiner closed the record. *Id.*

III. Discussion

A. Timeliness of the Complaint’s allegations

The Hearing Examiner found that the Complaint contained unfair labor practice allegations that resulted from a November 2009 meeting between the Parties. (Report at 17). Based on the Complaint, the Stipulation, and testimony during the hearing, the Hearing

Examiner found that the meeting “probably occurred on November 4, 2009.” *Id.* The Complaint’s allegations against DCPS, arising from the November 2009 meeting, were “failing and refusing to provide AFSCME with relevant information, unilaterally implementing IMPACT and terminating employees under IMPACT.” (Report at 16).

Board Rule 520.4 provides: “Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred.” Additionally, in previous cases, the Board held that PERB’s Rule establishing the time allowed to initiate a complaint is jurisdictional and mandatory. *Hoggard v. District of Columbia Public Schools*, 43 D.C. Reg. 1297, Slip Op. 352, PERB Case No. 93-U-10 (1996); *see also Public Employee Relations Board v. D.C. Metropolitan Police Department*, 593 A.2d 641 (D.C.C. 1991). Hence, PERB’s Rule 520.4 does not provide the Board with discretion to make exceptions for extending the deadline for initiating an action. *Id.*

Based on the Board’s requisite filing deadline, the Hearing Examiner concluded that PERB did not have jurisdiction to consider unfair labor practice complaints based on facts or circumstances prior to April 14, 2011.¹ (Report at 16-17). Consequently, the Hearing Examiner found that the August 10, 2011, Complaint was untimely filed for the allegations relating to the November 2009 meeting where “DCPS allegedly failed to provide information on” the IMPACT evaluation process; “the alleged implementation of the IMPACT evaluation process;” and “DCPS’s alleged refusal to bargain over IMPACT for the 2009-2010 school year.” (Report at 17).

In AFSCME’s Exceptions regarding its information request, the Union argues that the Hearing Examiner improperly found that the statute of limitations began to run in November 2009. The Exceptions challenge the Hearing Examiner’s recommendation, because “[t]he Hearing Examiner did not make a finding on whether DCPS provided any of the requested IMPACT information, or that DCPS denied the information request, or that there was a certain date by which the Union knew or should have known that DCPS would not provide it.” (Exceptions at 11). As stated above, however, the Hearing Examiner found that the Complaint asserted that DCPS committed an unfair labor practice by “failing and refusing to provide AFSCME with relevant information”. (Report at 16). The Hearing Examiner made a factual determination that AFSCME alleged DCPS had refused to provide information to it, and that DCPS’s refusal to provide information occurred during the November 2009 meeting. The complaint by AFSCME of an unfair labor practice concerning the information request became ripe at the time of DCPS’s refusal. Therefore, the statute of limitations began to run when DCPS refused to provide information on AFSCME’s information request at the November 2009 meeting. AFSCME’s Exceptions to the Hearing Examiner’s conclusion is a disagreement of fact.

The Board will affirm a hearing examiner’s findings if they are reasonable and supported by the record. *See American Federation of Government Employees, Local 872 v. D.C. Water and Sewer Authority*, Slip Op. No. 702, PERB Case No. 00-U-12 (March 14, 2003). Moreover, a hearing examiner has the authority to determine the probative value of evidence and draw reasonable inferences from that evidence. *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1999).

¹ April 12, 2011, is the correct calculation of the 120-day deadline.

Therefore, as the Hearing Examiner's findings are reasonable, the Union's Exceptions to the Hearing Examiner's determination that the Complaint's allegations arising from the November 2009 meeting were untimely filed are denied.

B. Agency's alleged refusal to engage in impact and effects bargaining

Management violates its statutory duty to bargain when it implements a management decision in the face of a timely union request to bargain over impact and effects. See *American Federation of Government Employees, Local 383 v. D.C. Department of Human Services*, 49 D.C. Reg. 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002); *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). Further, the Board has determined that the duty to bargain "extends to matters addressing the impact and effect of management actions on bargaining unit employees as well as procedures concerning how these rights are exercised." *Teamsters, Local 639 and District of Columbia Public Schools*, 38 D.C. Reg. 6693, Slip Op. No. 263, PERB Case No. 90-N-02 (1991); *AFSCME, Council 20 v. District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining*, 36 D.C. Reg. 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). In prior cases the Board held that "although the implementation of a performance evaluation system is a non-negotiable subject of collective bargaining, an agency is obligated to bargain in good faith over the adverse impact a performance evaluation may have on the terms and conditions of an employee's employment." See *American Federation of Government Employees, Local 631, and Department of Public Works*, Slip Op. No. 1334, PERB Case No. 09-U-18 (October 19, 2012) (citations omitted).

Notwithstanding, "Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain." *D.C. Nurses Association v. Department of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012); *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). "Absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-61[7].[0] 4(a)(5) and (1) by unilaterally implementing a management right under [the CMPA]." *Fraternal Order of Police v. D.C. Metropolitan Police Department*, 59 D.C. Reg. 5427, Slip Op. No. 984, PERB Case No. 08-U-09 (2012) (quoting *American Federation of Government Employees, Local Union No. 383, AFL-CIO v. District of Columbia Department of Human Services*, 49 D.C. Reg. 770, Slip Op. No. 418, PERB Case No. 94-U-09 (2002)). Furthermore, an unfair labor practice has *not* been committed until there has been a general request to bargain and a "blanket" refusal to bargain. *FOP v. Department of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002); *International Brotherhood of Police Officers v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992).

The Hearing Examiner found that "[t]he gravamen of AFSCME's Complaint is that DCPS unilaterally implemented the IMPACT evaluation process without I[mpact] & E[ffects] bargaining in violation of D.C. Code § 1-617.04(a)(1) and (5) despite AFSCME's demand to bargain the I[mpact] & E[ffects] issues arising from DCPS's exercise of its management rights regarding the IMPACT 2.0 evaluation processes and instruments." (Report at 20).

Based on testimony and the record, the Hearing Examiner found that “AFSCME was notified on May 11, 2010 of DCPS’s intention to implement IMPACT 2.0 for school year 2010-2011;” and that “AFSCME failed to respond to the notification and only raised IMPACT 2.0 for the first time at the June 22, 2010 meeting.” (Report at 21). Additionally, the Hearing Examiner concluded: “the record reveals that, other than telling the DCPS representatives to set up an appointment with Mr. Johnson, Mr. Reichert did not demand to bargain I[mpact] & E[ffects] issues resulting from the changes reflected in IMPACT 2.0.” (Report at 22 citing Tr at 43-45).

The Hearing Examiner determined that “[n]o clear demand to bargain I&E issues arising from the implementation of IMPACT 2.0 is discernable in the UX 1 e-mail thread.” (Report at 22). The Hearing Examiner stated: “Moreover, when asked by DCPS counsel at hearing, ‘Is there anywhere in this e-mail that you specifically asked to bargain?’ Reichert responded, ‘I don’t use the term, “we shall bargain,” no.’” *Id.*

The Report states, “To prove a violation of D.C. Code § 1-617.04(a)(1) and (5), the PERB’s precedent requires a clear and timely demand to bargain I[mpact] [and] E[ffects] issues from the union followed by a refusal to bargain from the agency.” (Report at 22). The Hearing Examiner found that “the record does not establish that AFSCME made a clear and timely demand to bargain I[mpact] & E[ffects] issues arising from DCPS’s implementation of the IMPACT or IMPACT 2.0 evaluation procedures.” (Report at 23). In addition, “[i]n the absence of a clear and time[ly] demand to bargain I[mpact] & E[ffects] issues, the Hearing Examiner further finds that DCPS did not violate D.C. Code § 1-617.04(a)(1) and (5) when it implemented IMPACT 2.0.” (Report at 23).

In its Exceptions, the Union disagrees over the “clarity” requirement for an impact and effects demand to bargain. (Exceptions at 12). Pursuant to PERB precedent, regarding its demand to bargain, the Union contends that a demand for impact and effects bargaining does not require the use of the specific term “impact and effects.” *Id.* Further, the Union argues that the “demand for bargaining information sufficiently informed DCPS that the Union wanted to bargain.” *Id.* The Agency argues that the Union’s Exceptions are merely a disagreement with the Hearing Examiner’s finding that the Union did not demand to bargain impact and effects issues. (Opposition at 3).

The question of whether there has been a timely request for impact and effect bargaining is often an issue of fact. *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip. Op. No. 635, PERB Case No. 99-U-04 (2000). In *NAGE, Local R3-06 v. D.C. WASA*, the Board upheld a Hearing Examiner’s findings that “[n]otwithstanding the lack of clarity in NAGE’s demands for negotiations over the reorganization . . . that, under Board precedent, even a broad, general request for bargaining ‘implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable.’” *Id.* (quoting *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) (“Any general request to bargain over a matter implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable.”)).

The Board determines whether the Hearing Examiner's Report and Recommendation is "reasonable, supported by the record, and consistent with Board precedent." *American Federation of Government Employees, Local 1403 v. District of Columbia Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012). The Hearing Examiner's conclusion that "PERB precedent requires a clear and timely demand to bargain impact and effects issues" is incorrect. See *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). The Hearing Examiner's additional element that a timely request for impact and effects bargaining must be "clear" is not established in Board precedent. Consequently, as the Hearing Examiner relied upon an incorrect standard in determining whether the Union made a timely request to bargain, the Board finds that there is insufficient information upon which to make a determination as to whether the Hearing Examiner's findings are supported by the record.

Therefore, with the Board's direction to apply the correct standard when reviewing the impact and effects allegation in this case, the Board remands the matter to the Hearing Examiner on the issue of whether a proper and timely request to bargain was made by the Union. The Board adopts in part the Hearing Examiner's Report and Recommendation to dismiss the Complainant's allegations regarding AFSCME's information request and demand to bargain at a November 2009 meeting between the Parties.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is dismissed in part with prejudice, concerning the Union's allegations pertaining to an information request and demand for bargaining at a November 2009 meeting.
2. The Hearing Examiner shall make factual findings and conclusions as to whether the Complainant requested bargaining and whether the Respondents refused to bargain under the circumstances of this case. The Hearing Examiner may conduct further proceedings, if necessary.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEES RELATIONS BOARD

February 15, 2013

CERTIFICATE OF SERVICE

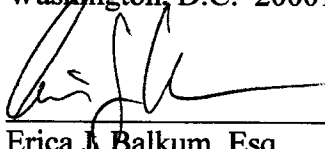
This is to certify that the attached Decision and Order in PERB Case No. 10-U-49(a) was transmitted via U.S. Mail to the following parties on February 15, 2013.

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