Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
American Federation of Government Employees, Local 1000	)	PERB Case No. 13-U-07
Complainant	)	
	)	Opinion No. 1730
v.	)	
District of Columbia Department of Employment Services	)	
Respondent	)	

DECISION AND ORDER ON REMAND

I. Statement of the Case

This case comes before the Board on remand from the Superior Court of the District of Columbia.[1] The Complainant, American Federation of Government Employees, Local 1000 (AFGE Local 1000), filed an unfair labor practice complaint (Complaint) against the District of Columbia Department of Employment Services (DOES), alleging that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by unilaterally implementing a dress code policy (2012 Dress Code) without engaging in substantive bargaining or, alternatively, failing to engage in good faith bargaining over the impact and effects of the implementation of the 2012 Dress Code. DOES filed a timely Answer.

[1] *See Am. Fed'n of Gov't Emp., Local 1000 v. D.C. Dep't of Empl. Serv.*, 65 D.C. Reg. 9268, Slip Op. No. 1671, PERB Case No. 13-U-07 (2018). In Opinion 1434, the Board ordered the complaint to "an unfair labor practice hearing to determine whether a past practice existed in which employees were not held to any particular dress code and were not disciplined for their attire or appearance." *Am. Fed'n of Gov't Emp., Local 1000*, Slip Op. No. 1434 at 6. A hearing was held, and the Hearing Examiner's findings went before the Board. In Opinion 1578, the Board rejected the Hearing Examiner's finding that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5). *Am. Fed'n of Gov't Emp., Local 1000 v. D.C. Dep't of Emp. Serv.*, 63 D.C. Reg. 9800, Slip Op. No. 1578 at 5, PERB Case No. 13-U-07 (2016). Opinion 1578 was appealed to the D.C. Superior Court. PERB subsequently moved the court to voluntarily remand the case back to PERB to clarify its initial decision. The court granted that motion without addressing the underlying merits of Opinion 1578.

The Board finds that DOES violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by failing to engage in substantive bargaining over the 2012 Dress Code.

II. Procedural Background

A. 2012 Dress Code

According to the Hearing Examiner's Report and Recommendation (Report), the bargaining unit consisted of approximately 344 non-professional employees at DOES.[2] Some DOES bargaining unit employees interacted directly with the public. Other bargaining unit employees did not interact with the public, but occasionally performed duties in view of the public.[3]

The 2012 Dress Code set forth a standard of professional business attire for all employees while performing official duties, especially when employees were in contact with the general public and non-DOES employees.[4] The policy listed examples of professional business attire, such as suits, blazers, collared shirts, dress pants, and dresses.[5] The 2012 Dress Code also listed attire that was inappropriate at all times, including athletic wear, casual wear, and beach wear.[6] A number of exceptions to the policy were outlined, such as casual Fridays, prior supervisory approval, and justifiable medical conditions.[7]

The Deputy Director was responsible for the final determination that an employee violated the 2012 Dress Code. The 2012 Dress Code further stated that the Director had sole discretion to continue, revise, or revoke the policy.[8]

It is undisputed that the 2012 Dress Code was never implemented by DOES.[9]

B. The Complaint and Answer

The Complaint alleged that on October 12, 2012, DOES announced the pending implementation of the 2012 Dress Code.[10] The Complaint further alleged that DOES did not take any steps to bargain with AFGE Local 1000 over the decision to implement the policy or the impact and effects of the policy.[11] The Complaint also stated that there had been "a long-standing past-practice that employees were not held to any particular dress code" and that the

[2] Hearing Examiner's Report and Recommendation at 4.
[3] Report at 8.
[4] Report at 6.
[5] Report at 6.
[6] Report at 7.
[7] Report at 7.
[8] Report at 8.
[9] Report at 8.
[10] Complaint at ¶ 4.
[11] Complaint at ¶ 6.

"implementation of a dress code or any material change to an existing dress code is a mandatory subject of bargaining."[12]

In its Answer, DOES responded that the 2012 Dress Code was not a new policy, but rather a revised policy that replaced a previous dress code that was implemented in 1999.[13] DOES also stated that it had engaged in impact and effects bargaining.[14] As an affirmative defense, DOES denied that the dress code was a mandatory subject of bargaining, and asserted that the implementation of a dress code was a management right to direct employees and to determine internal security practices.

C. Opinion 1578

In Opinion 1578, the Board held that an agency does not violate D.C. Official Code §§ 1-617.04(a)(1) and (5) by refusing to engage in substantive bargaining over a management right decision that is in harmony with D.C. Municipal Regulations (DCMR).[15] Specifically with regard to the implementation of a dress code, the Board looked at 4 DCMR §§ 513.1-2 which permits agencies to "prescribe standards of appearance or dress for personnel which serve a reasonable business purpose." The Board found in cases where the dress code goes beyond the language and scope of the DCMR, the dress code could not be imposed without bargaining.[16]

On June 20, 2018, the Board vacated its decision and order in Opinion 1578, and ordered the case to a hearing to develop a factual record regarding (1) whether the implementation of the dress code was directly and integrally related to the accomplishment of the agency's mission; and (2) whether the establishment of the dress code was an exercise of the agency's management right to direct employees and to determine the agency's internal security practices.[17] A hearing was held October 3, 2018.

III. Hearing Examiner's Report and Recommendation

The Hearing Examiner found that (1) the implementation of the 2012 Dress Code was not directly and integrally related to the accomplishment of the agency's mission; and (2) the 2012 Dress Code did not fall within the agency's management right to direct employees nor to determine its internal security practices. Accordingly, the Hearing Examiner found that the implementation of the 2012 Dress Code was a mandatory subject of bargaining.[18]

In reaching his conclusions, the Hearing Examiner found that a dress code may be unilaterally implemented under an agency's statutory management right to direct employees,

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[12] Complaint at ¶ 8 and 9.
[13] Answer at 3.
[14] Answer at 2-3.
[15] *Am. Fed'n of Gov't Emp., Local 383 v. D.C. Dep't of Youth Rehab. Serv*., 63 D.C. Reg. 9778, Slip Op. No. 1577 at 11, PERB Case No. 13-U-06 (2016).
[16] *Id*.
[17] Slip Op. No. 1671 at 2.
[18] Report at 21.

only when a dress code is directly and integrally related to the agency's mission. The Hearing Examiner looked to DOES's mission, which was to "connect District residents, job seekers, and employers to opportunities and resources that empower fair, safe, effective working communities," and involved some employees' direct contact with the public.[19] The Hearing Examiner found that DOES had served constituents for decades without a dress code and did not have any documented complaints of a bargaining unit employee's workplace attire. Furthermore, the Hearing Examiner found no evidence that DOES was hindered in accomplishing its mission by the workplace attire of its employees nor any improvement in customer service from a change in employee attire, after a 2018 dress code policy was implemented.[20]

The Hearing Examiner also found that the 2012 Dress Code did not fall within DOES's management right to determine its internal security practices, because DOES failed to prove that the dress code was a rational means of differentiating employees from the public.[21]

IV. Discussion

The Board will adopt a Hearing Examiner's Report and Recommendation if the recommendations are reasonable, supported by the record, and consistent with Board precedent.[22] The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."[23] Mere disagreements with a hearing examiner's findings do not constitute proper exceptions if the record contains evidence supporting the hearing examiner's conclusions.[24]

DOES filed Exceptions to the Hearing Examiner's Report and Recommendation.[25] DOES argues that the Report is contrary to D.C. Official Code § 1-617.08(a)(1), 4 DCMR §§ 513.1 and 513.2, and unsupported by the record.[26] DOES asserts that it has the exclusive right to direct employees of the agency to dress in a manner that serves a reasonable business purpose or dress in a manner that prevents a danger to the health, welfare, or safety of employees or customers.[27] According to DOES, the content of the dress code shows a clear business purpose directly related to maintaining its professional image.[28] DOES further asserts that the language of the DCMR is broad and does not limit management to implementing a dress code only if it is directly and integrally related to the mission of the agency.[29]

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[19] Report at 23.
[20] Report at 23-24.
[21] Report at 27.
[22] *See Am. Fed'n of Gov't Emp., Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).
[23] *Council of Sch. Officers, Local 4, Am. Fed'n of Sch. Adm'r v.* Slip Op. 1016 at 6; *Tracy Hatton v. FOP/DOC Labor Comm*., 47 D.C. Reg. 769, Slip Op. 451 at 4, PERB Case No. 95-U-02 (1995).
[24] *Hoggard v. DCPS, supra*, Slip Op. No. 496 at p. 3, PERB Case No. 95-U-20.
[25] Exceptions at 1.
[26] Exceptions at 4.
[27] Exceptions at 6.
[28] Exceptions at 6.
[29] Exceptions at 8.

In its Exceptions, DOES also argues that AFGE Local 1000 has the burden to prove that DOES committed an unfair labor practice by failing to bargain substantively over the 2012 Dress Code. According to DOES, this burden requires proving that the 2012 Dress Code went beyond the scope of the DCMR and was a mandatory subject of bargaining.[30] DOES claims that the Hearing Examiner improperly shifted the burden to DOES to prove that the dress code was a legitimate exercise of a management right.[31]

On April 4, 2019, AFGE Local 1000 filed an Opposition to the Exceptions. AFGE Local 1000 argues that the Exceptions are nothing more than a disagreement with the Hearing Examiner's legal and factual conclusions.

A. Substantive Bargaining of the 2012 Dress Code

The Board finds that the implementation of the 2012 Dress Code is not a management right and must have been substantively bargained over.

The Board has long followed the categorization of subjects of bargaining set forth in *NLRB v. Borg-Warner Corp.*[32] As the Supreme Court held, some matters are mandatory subjects of bargaining, some are permissive, and some are illegal.[33] Subjects that are mandatory subjects of bargaining are those upon which the employer is required to bargain. If the employer does not, it will have committed an unfair labor practice for failing to bargain in good faith.[34] Subjects which are permissive subjects of bargaining are those which management may but is not required to bargain. Finally, illegal subjects of bargaining are those forbidden by law and which the parties are not permitted to bargain. The Comprehensive Merit Personnel Act's (CMPA) inclusion of a "Management Rights" section, alters dramatically the categorization of several subjects of bargaining: Some subjects that may be mandatory in the private sector are permissive under the CMPA.

D.C. Official Code § 1-617.08(b) provides that "[a]ll matters shall be deemed negotiable, except those that are proscribed by this subchapter." The Board has held that this language creates a presumption of negotiability.[35] Thus, an agency must overcome this "presumption" when seeking to establish its affirmative defense that it has a management right to impose a dress code. The Board holds that so long as a dress code is directly linked to the methods and means of performing work in support of the agency's mission,[36] then it is a management right to direct employees.

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[30] Exceptions at 11.
[31] Exceptions at 10.
[32] 356 U.S. 342, 349 (1958).
[33] *Id.*
[34] *See* D.C. Official Code § 1–617.04(a)(5).
[35] *See Compensation Unit 31 (American Federation of Government Employees, Locals 631, 872, and 2553; American Federation of State, County, and Municipal Employees, Local 2091; and National Association of Government Employees, Local R3-06) v. District of Columbia Water and Sewer Authority*, 64 D.C. Reg. 9287, Slip Opinion No 16-N-02, PERB Case No. 16-N-02 (2017).
[36] The Board finds language from the Federal Labor Relations Authority persuasive in this case. *See Adjutant Gen'l, St. Of Ohio and AFGE, Ohio CANG Locals, Council 127*, 21 FLRA 1062 (May 30, 1986).

i. Directing Employees

The 2012 Dress Code does not fall under management's right to direct employees. The CMPA's reference to "applicable laws and rules and regulations" means that management's directions must comply with the law. It is important to note that compliance with the law does not make a subject of bargaining a management right. Even if permitted by law, the subject matter in dispute must be an exercise of a management right listed in D.C. Official Code § 1-617.08(a) to exempt an agency from substantive bargaining. Whether the imposition of a dress code is a "management right" requires case-by-case analysis.[37]

Management's right to "direct employees" is not unbounded. To be considered a management right, the direction of an employee, including the 2012 Dress Code, must be directly related to the agency's mission.

The Hearing Examiner found no evidentiary connection between the 2012 Dress Code and a legitimate business purpose or DOES's mission. The Hearing Examiner found that DOES served its constituents for decades without an employee dress code and without any complaints of the workplace attire of bargaining unit employees. The Board finds that the Hearing Examiner's factual determinations and conclusions are reasonable based on the record. The Board concludes that the imposition of the 2012 Dress Code was not an exercise of management's right to direct employees, and required substantive bargaining.[38]

ii. Internal Security Practices

The Board finds that the 2012 Dress Code did not fall under management's right to determine internal security practices. The Hearing Examiner found that the 2012 Dress Code did not reasonably relate to DOES's internal security objective of differentiating employees from non-employees.[39] The 2012 Dress Code did not require employees to wear any logo or apparel that identified them as DOES employees. The Hearing Examiner determined that DOES failed to prove that the dress code was a rational means of achieving the goal of differentiating employees from members of the public.[40] Based on these factual determinations, the Board finds that the imposition of the 2012 Dress Code was not reasonably related to management's right to direct internal security practices, and required substantive bargaining.

B. Impact and Effects Bargaining

Since the Board concludes that DOES failed to engage in substantive bargaining, there is no need to address AFGE's allegation that DOES failed to engage in impact and effects bargaining.

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[37] D.C. Official Code § 1-617.08(a)(1).
[38] Report at 24.
[39] Report at 26.
[40] Report at 27.

C. Remedies

Typically, as a remedy for failing to bargain, the Board would order the parties to engage in substantive bargaining over the 2012 Dress Code. However, in this case, DOES implemented a new dress code in 2018 (2018 Dress Code), and the record does not show that AFGE Local 1000 requested to bargain over the 2018 Dress Code. Therefore, the remedy to bargain is rendered moot.

Notwithstanding, the Board has previously held that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations."[41] "[I]t is the furtherance of this end, i.e., the protection of employee rights…[that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violation found and the relief afforded."[42] Accordingly, DOES is required to post a notice regarding its violation.

V. Conclusion

Based on the foregoing, the Board finds that DOES failed to engage in substantive bargaining over the 2012 Dress Code in violation of D.C. Official Code §§ 1-617.04(a)(1) and (5). Accordingly, the Board orders DOES to post a notice detailing its violations of the CMPA.

ORDER

IT IS HEREBY ORDERED THAT:

1. DOES shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days;

2. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Board Members Mary Anne Gibbons, and Douglas Warshof.

October 17, 2019

Washington, D.C.

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[41] *NAGE, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at 15-16, PERB Case No. 99-U-04 (2000).
[42] *AFGE, Local 2978 v. D.C. Dep't of Health*, 61 D.C. Reg. 8025, Slip Op. No. 1443, PERB Op. No. 14-U-01 (2013) (citing *Bagenstose v. D.C. Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at 3, PERB Case No. 88-U-33 (1991)).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-07, Op. No. 1730 was sent by File and ServeXpress to the following parties on this the 29th day of October, 2019.

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