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

In the Matter of:)	
)	
AFSCME District Council 20,)	
Local 2921, AFL-CIO,)	
Complainant,)	PERB Case No. 09-U-63
)	
v.)	Opinion No. 1320
)	
District of Columbia)	
Department of General Services,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

On September 11, 2009, Complainant AFSCME District Council 20, Local 2921 (“Union” or “Complainant”) filed an unfair labor practice complaint (“Complaint”), alleging Respondent District of Columbia Department of General Services¹ (“Agency” or “Respondent”) violated D.C. Code §§ 1-617.04(a)(1) and (5) by failing and refusing to bargain in good faith. (Complaint at 3). Specifically, the Union charges that the Agency refused to meet to bargain over the impact and effects of a reduction-in-force (RIF), as well as failed to provide the Union with requested information pertaining to the RIF. *Id.*

In its Answer (“Answer”), the Agency denies violating D.C. Code §§ 1-617.04(a)(1) and (5), and raises the affirmative defense that the Union’s allegations fail to allege an unfair labor practice. (Answer at 2). Further, the Agency states that that as of October 7, 2009, it has provided the Union with information responsive to its request. *Id.*

¹ The Complaint originally lists the Respondent as the District of Columbia Office of Public Education Facilities Modernization. In October 2011, the Department of General Services assumed the functions and responsibilities of the Office of Public Education Facilities Modernization.

The issues before the Board are: 1) whether the Agency refused to engage in impact and effects (I&E) bargaining with the Union; and 2) whether the Agency improperly refused to provide the Union with the requested information that pertains to the RIF.

II. Discussion

A. Duty to bargain

By letter dated August 26, 2009, the Union demanded I&E bargaining over a RIF impacting bargaining unit members, which was to go into effect on September 29, 2009. (Complaint at 2; Answer at 2). In the letter, the Union stated that “[i]f the parties are unable to complete negotiations over the impact and effects of the RIF before the effective date of September 29, 2009, the Union demands that the RIF be postponed until such time as the parties have completed their negotiations.” (Complaint at 2; Answer at 2).

The Agency responded on September 1, 2009, stating that “...impact and effects bargaining appears inapplicable to the instant matter.” (Complaint at 3; Answer at 2). The Agency adds that the letter also stated “...OPEFM is committed to fostering a mutually productive relationship with the Union and is available to discuss the Union’s concerns at the forthcoming monthly OPEFM-AFSCME meeting.” (Answer at 2). Further, the Agency contends that “it offered to discuss Complainant’s impact and effects concerns at the monthly AFSCME/OPEFM meeting held on September 3, 2009. However, Complainant failed to address these matters at the meeting.” *Id.*

RIFs are a management right under D.C. Code § 1-617.08. See, e.g., *FOP/DOCLC v. Dept. of Corrections*, 49 D.C. Reg. 11141, Slip Op. No. 692, PERB Case No. 01-N-01 (September 30, 2002) (“After reviewing D.C. Law 12-124 ‘Omnibus Personnel Reform Act of 1998,’ the Board finds that this Act amended the CMPA by, *inter alia*, excluding RIF procedures and policies as proper subjects of bargaining.”). The Board has long held that “an Employer violates the duty to bargain in good faith by refusing to bargain, upon request, over the impact and effects of a RIF and by refusing to produce documents related to the RIF.” *FOP/DOCLC v. DOC*, 52 D.C. Reg. 2496, Slip Op No. 722, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32 (August 13, 2003); see also *Teamsters Unions No. 639 and 730, et al., v. D.C. Public Schools*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (November 1, 1990).

Based on Board precedent, the Agency was required to engage in I&E bargaining over the RIF. For the following reasons, the Agency’s offer to “discuss the Union’s concerns” at the next monthly AFSCME/OPEFM meeting was not sufficient to fulfill the duty to meet and engage in I&E bargaining.

Inviting the Union to discuss its concerns at a monthly meeting is akin to inviting a union to give its input regarding a management rights decision. Board precedent states that such meetings “[are] not sufficient to fulfill the duty and meet the standard for bargaining over the impact of a management right.” *AFGE Local 383 v. D.C. Dept. of Mental Health*, 52 D.C. Reg. 2527, Slip Op. No. 753, PERB Case No. 02-U-16 (October 15, 2004); see also *Int’l Brotherhood*

of Police Officers, Local 446 v. D.C. General Hospital, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (July 15, 1992); *FOP/MPDLC v. Metropolitan Police Dept.*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000); *FOP/DOCLC v. Dept. of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (May 17, 2002).

Therefore, the Board finds that the Agency failed to bargain with the Union over the impact and effects of the September 2009 RIF.

B. Request for Documents

The Board has found that failing to timely produce a document is an unfair labor practice where the delay is unreasonable. See *Doctors Council of D.C. General Hospital v. D.C. General Hospital*, 46 D.C. Reg. 6268, Slip Op. No. 482, PERB Case Nos. 95-U-10 and 95-U-18 (1996); *AFGE Local 631 v. D.C. Water and Sewer Authority*, 52 D.C. Reg. 2510, Slip Op. No. 730, PERB Case No. 02-U-19 (September 30, 2003). The issue of whether the Agency's delay was reasonable is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. See *Barganier v. FOP/DOCLC and DC DOC*, 45 D.C. Reg. 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998).

Therefore, the Board finds that the Agency failed to bargain with the Union over the impact and effects of the September 2009 RIF, in violation of the CMLPA. Additionally, the parties will proceed to an unfair labor practice hearing on the issue of whether the Agency's delay in producing the requested documents constitutes an unfair labor practice.

III. Remedies

In the Complaint, the Union requests that the Board order the Agency to:

- Desist from violations of D.C. Code §§ 1-617.04(a)(1) and (5) in the manner alleged or in any like or related manner;
- Adhere to the collective bargaining agreement;
- Provide the Union with information responsive to the Union's instant and future requests for bargaining information at no cost to the Union;
- Restore the status quo and postpone any RIF until the Union has been provided the requested information and the parties have had the opportunity to conclude impact and effects negotiations;
- Bargain with the Union over the impact and effect of the RIF;
- Make all bargaining unit employees whole for all monetary loss incurred as a result of its departure from the status quo, with compounded interest;
- Pay all costs associated with the Union's prosecution of this charge;
- Post an appropriate notice to employees; and
- Desist from or take such affirmative action as effectuates the policies and purposes of the Comprehensive Merit Personnel Act of 1978.

(Complaint at 3-4).

The Board will order the Agency to desist violations of D.C. Code §§ 1-617.04(a)(1) and (5) in the manner alleged or in any like or related manner. As to the Union's request that the Board direct the Agency to adhere to the provisions of the parties' CBA, the Board jurisdiction does not extend to resolution of disputes pertaining to breaches of a parties' collective bargaining agreement. Furthermore, the Union has not alleged any actual violations of the parties' collective bargaining agreement which would constitute a repudiation of the contract. See *Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO, v. District of Columbia Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016, PERB Case No. 09-U-08 (2010). Thus the Board will not order the Union to adhere to the collective bargaining agreement.

The Agency has already provided the Union with information responsive to its request for bargaining information. (Answer at 2). According to the Complaint, the Agency initially treated the Union's information request as a FOIA request "subject to fees for the search, review, and copying of the requested documents." (Complaint at 3). The Complaint and Answer do not make it clear whether the Union actually paid these fees. If the Union did pay fees for the information it received, the Board orders the Agency to refund those fees.

The RIF has already occurred and cannot be postponed. The Agency is not required to rescind the changes effectuated by the RIF. The Board has held that *status quo ante* relief is generally inappropriate to remedy a refusal to bargain over impact and effects. *AFSCME Local 383 v. District of Columbia Department of Mental Health*, 52 D.C. Reg. 2527, Slip Op No. 753 at p. 7, PERB Case No. 02-U-16 (2004) (citing *FOP/MPDLC v. MPD*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000)). Furthermore, *status quo ante* relief is not appropriate when: (1) the rescission of the management decision would disrupt or impair the Agency's operations; and (2) there is no evidence that the results of such bargaining would negate a management rights decision. *Id.* In the instant case, rescinding the RIF after almost three years would disrupt the Agency's operations. Additionally, because decisions regarding the number of employees are within the scope of management rights, bargaining cannot negate the Agency's decision. As the departure from the status quo was a management right, and *status quo ante* relief is inappropriate, the Agency will not be ordered to reimburse bargaining unit members for any monetary loss.

The Agency is ordered to bargain with the Union over the impact and effects of the RIF.

The Agency will post a notice acknowledging its violation of the CMPA. The Board has recognized 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." *Nat'l Assoc. of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Further, "it is in the furtherance of this end, *i.e.*, the protection of employee rights...[that] underlies [the

Board's] remedy requiring the post of a notice to *all employees* concerning the violation found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected." *Bagentose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991).

The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 98-U-02 (2000):

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed... Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued... What we can say here is that among the situation in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

In the instant case, a determination on the awarding of costs will be held pending the report and recommendation of the hearing examiner.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFSCME District Council 20, Local 2921's Unfair Labor Practice Complaint is granted in part.
2. The District of Columbia Department of General Services, its agents, and representatives shall bargain with AFSCME District Council 20, Local 2921, its agents, and representatives, over the impact and effects of the RIF implemented in September 2009.
3. The District of Columbia Department of General Services shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice

where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

4. The District of Columbia Department of General Services shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly.
5. The District of Columbia Department of General Services shall reimburse AFSCME District Council 20, Local 2921 for any fees paid for the search, review, and copying of the documents pertaining to its information request of August 26, 2009.
6. The Board's Executive Director shall refer the Complainant's Unfair Labor Practice Complaint to a hearing examiner on the production of documents question only.
7. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

August 24, 2012.

CERTIFICATE OF SERVICE

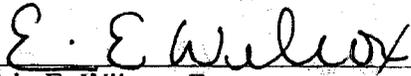
This is to certify that the attached Decision and Order in PERB Case No. 09-U-63 was transmitted via U.S. Mail and e-mail to the following parties on this the 24th day of August, 2012.

Ms. Brenda Zwack, Esq.
O'Donnell, Schwartz & Anderson, PC
1300 L St. NW
Suite 1200
Washington, D.C. 20005
bzwack@odsalaw.com

U.S. MAIL and E-MAIL

Mr. Charles J. Brown, Esq.
Department of General Services
2000 14th St, NW
8th Floor
Washington, D.C. 20009
charles.brown6@dc.gov

U.S. MAIL and E-MAIL



Erin E. Wilcox, Esq.
Attorney-Advisor