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

In the Matter of:)	
)	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee)	
)	
Petitioner,)	PERB Case No. 09-U-34
)	
v.)	Opinion No. 1552
)	
District of Columbia Metropolitan Police Department Respondent.)	
)	

DECISION AND ORDER

On May 15, 2009, Fraternal Order of Police/Metropolitan Police Department Labor Committee (“Union” or “FOP”) filed an unfair labor practice complaint alleging that the Metropolitan Police Department (“Respondent” or “MPD”) (1) refused and failed to engage in bargaining and (2) improperly interfered with the Union’s rights to participate in negotiations relating to training, time-in-grade requirements, methods of evaluating and determining qualifications for promotional examinations in violation of D.C. Official Code 1-617.04(a)(1) and (5).

The Board adopts the Hearing Examiner’s findings and recommendations that MPD did not violate the D. C. Official Code § 1-617.04(a)(1) and (5) as alleged. The Hearing Officer’s recommendations were reasonable, supported by the record and consistent with the Board’s precedents.¹

I. Hearing Examiner’s Report and Recommendation
A. Duty to Bargain

¹ *Fraternal Order of Police/Metropolitan Police Department/Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5485, Slip Op. No. 991, PERB Case No. 08-U-19 (2019); *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 6579, Slip Op. No. 1118, PERB Case No. 08-U-19 (2011); and *American Federation of Government Employees, Local 872 v. District of Columbia Water and Sewer Authority*, 52 D.C. Reg. 2474, Slip Op. No. 702, PERB Case No. 00-U-12 (2003).

As early as January 1998, MPD has had established rules specifying how officers could seek promotion to sergeant, lieutenant and captain.² Prior to 2009, the rule required officers to remain in grade for 5 years before becoming eligible to apply to the position of sergeant and for sergeants to remain in grade for 3 years before becoming eligible to apply for a lieutenant position. This was known as the “5 and 3 year rule.”³ In March 2009, MPD proposed rulemaking to change the eligibility qualifications for taking the sergeant and lieutenant promotional examinations.⁴ The proposed eligibility requirements provided that an officer remain in grade for four years prior to qualifying to take the sergeant’s exam, and a sergeant remain in grade for two years prior to qualifying for the lieutenant’s exam. This came to be known as the “4 and 2 year rule.”⁵ In early March 2009, FOP orally requested bargaining over the proposed changes to time-in-grade requirements for promotional examinations.⁶ The Hearing Examiner found that the parties met on March 19, 2009, and engaged in bargaining over the proposed changes.⁷

On March 25, 2009, FOP emailed MPD listing a number of requests for clarification on the proposed changes to the eligibility applications that it wanted to discuss at the next meeting. Specifically, the Union wanted a written explanation for the changes and the reason the current pool of applicants was not sufficient. In addition, the Union proposed that lieutenants remain in grade for 7 years before eligibility for captain; that new training, mentoring, and education standards be implemented for all promotees; that all promotion and special assignment processes be conducted entirely by an outside neutral third party; and that the department designate funds for outside education classes for members.

By letter dated April 8, 2009, MPD rejected the Union’s proposed changes as “non-negotiable” arguing that the proposals were an infringement on management rights and beyond the scope of impact and effects bargaining.⁸

On May 1, 2009, MPD issued Circular No. 09-01, “Announcement of the 2009 Promotional Process for Sergeant, Lieutenant and Captain.”⁹ According to that document, candidates were eligible to apply for promotions when they had been in the appropriate grade for the required number of years as of September 30, 2009.

On May 1, 2009, Detective Sergeant Robert Alder requested Chief of Police Cathy L. Lanier to change the eligibility date from September 30, 2009 to October 7, 2009, to enable 30 sergeants who were promoted on October 7, 2007 to become eligible to apply for the rank of

² R&R at 2

³ R&R at 2

⁴ R&R at 2

⁵ R&R at 2

⁶ R&R at 2

⁷ R&R at 2

⁸ R&R at 2

⁹ Lieutenants and captains were not part of FOP’s bargaining unit.

Lieutenant.¹⁰ On May 6, 2009, without consulting the Union, MPD amended Circular 09-01 changing the eligibility date for the 2009 promotional process to October 31, 2009.¹¹

On May 15, 2009, FOP filed an unfair labor practice complaint against MPD. The hearing was held on November 7, 2014. During the hearing, FOP claimed that the complaint included the allegation that MPD had engaged in direct dealing with a member of the bargaining unit and bypassing the union. MPD argued, to the contrary, that the complaint did not provide adequate notice of a claim of direct dealing or bypassing the union.

The Hearing Examiner found that the parties' collective bargaining agreement had a management rights clause. He went on to state that PERB has long held that an employer may assert a general management rights provision authorizing it to act unilaterally with respect to a particular term and condition of employment in light of a "clear and unmistakable" waiver by the Union.¹² He went on to find that the "clear and unmistakable" waiver standard requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, in spite of the statutory duty to bargain that would otherwise apply.¹³ The Hearing Examiner found that FOP, by agreeing to include several specific provisions in the management rights clause in the collective bargaining agreement, effectively waived any right it may otherwise have had to bargain on these issues.¹⁴

The Hearing Examiner further found that the management rights clause gave Respondent the right to make unilateral changes in the unit employees' terms and conditions of employment during the life of the collective bargaining agreement.¹⁵ This included the right to "direct employees of the Department," to "hire, promote, transfer, assign and retain employees in positions within the Department," to "alter, rearrange, change, extend, limit or curtail its operations or any part thereof," to "determine the qualifications of employees for appointment and promotion," and to "formulate, change or modify Department rules, regulations and procedure."¹⁶

With respect to the promotional process, the Hearing Examiner found that "the Union relinquished its right to demand bargaining over the implementation of a policy prescribing the time-in-grade requirements and methods of evaluating and determining qualifications for promotional examinations."¹⁷ The Hearing Examiner further found that on March 19, 2009, MPD engaged in impact and effects bargaining as requested by FOP.¹⁸ Therefore, by exercising its management rights and unilaterally implementing the requirements and qualifications

¹⁰ Union Exhibit 6

¹¹ Union Exhibit 7

¹² R&R at 4. See *University of the District of Columbia Faculty Association/National Education Association v. University of the District of Columbia*, 43 D.C. Reg. 5594, Slip Op. No. 387, PERB Case No. 93-U-22, 93-U-23 (1996); *Teamsters Locals 639 & 670 v. D.C. Public Employee Relations Board*, 631 A.2d 1205, 1217 (D.C. 1993).

¹³ R&R at 4.

¹⁴ R&R at 5.

¹⁵ R&R at 3.

¹⁶ R&R at 4.

¹⁷ R&R at 5.

¹⁸ R&R at 2.

mentioned above concerning the promotional examinations for sergeants, lieutenants and captains, the Hearing Examiner concluded that MPD did not commit a violation.¹⁹

B. Direct Dealing

In addition, the Hearing Officer found that the May 1, 2009 memorandum from Sergeant Robert Alder and the May 6, 2009 policy amendment were “subject to the parties” management rights clause and thus not actionable.²⁰

The Hearing Examiner found that the terminology used in the Complaint, “improper interference” and repeated references to the term refusal to bargain, did not adequately provide MPD with notice that it was being charged with direct dealing and bypassing the Union.”²¹ The Hearing Examiner noted that MPD stated that it was only during the hearing that it realized that FOP was charging it with a violation that encompassed direct dealing with a bargaining unit employee and bypassing the union.²² The Hearing Examiner was not convinced by FOP’s arguments that its interpretation of paragraphs 3, 15 and 16 of the Complaint should have put MPD on notice that it was complaining about direct dealing and bypassing the union.

II. FOP’s Exceptions

FOP has taken several exceptions to the Hearing Examiner’s Report and Recommendations.

First, FOP raises an exception to the Hearing Examiners finding that the Respondent did engage in good faith bargaining. FOP asserts that once MPD began negotiating with FOP it was required to continue bargaining in good faith about the changes in the promotional process, and impact and effects.²³

Second, FOP raises an exception to the Hearing Examiner’s finding that FOP had clearly and unmistakably waived its right to bargain over the proposed changes to the promotional process.²⁴ In this regard, FOP citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), asserts that it did not waive its ability to bargain on any management rights or the right to bargain over impact and effects.

¹⁹ R&R at 4.

²⁰ Because the Hearing Examiner found that the charge of direct dealing and bypassing the union were not properly addressed in the Complaint, we decline to address whether Sgt. Alder’s memorandum and MPD’s response are subject to the management rights clause. *AFGE v. DC PERB*, Case No. 2013 CA 005870 P (MPA) at 6 (D.C. Sup. Ct., July 30, 2015) (PERB can disregard factual disputes that are moot or that otherwise would not affect the outcome of its decision).

²¹ R&R at 5.

²² *Id.*

²³ FOP Exceptions at 13. Citing *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, Slip Op. No. 1391, PERB Case Nos. 09-U-52 & 09-U-53 (2013).

²⁴ R&R at 5.

Third, FOP raises an exception to the Hearing Examiner's finding that its training and educational proposals were (1) subject to the management rights clause and (2) exceeded the scope of permissible impact and effects bargaining.²⁵ In this regard, FOP asserts that its training and education proposals related to the impact and effects of MPD's proposed changes to the promotional process.

Fourth, FOP raises an exception to the Hearing Examiner's finding that the Complaint did not adequately provide the MPD with notice of the direct dealing and bypassing the union charge.²⁶ FOP asserts that the alleged facts set forth in the complaint put MPD on notice of being charged with direct dealing and bypassing the union. FOP argues that it was not required to use the express words "direct dealing" to sufficiently plead a violation of the Act. Further, MPD should be estopped from arguing that direct dealing was not properly pleaded because in PERB Case 09-U-50, MPD filed exceptions to the Hearing Examiner's Report and Recommendation in that matter asserting direct dealing was not properly pleaded in 09-U-50 but instead had been properly pleaded in this case.

Fifth, FOP raises an exception to the Hearing Examiner's finding that MPD did not engage in direct dealing or bypass the union in violation of the CMPA.²⁷ In this regard, FOP states that Hearing Examiner Arline Pacht found in PERB Case No. 09-U-50 that MPD engaged in direct dealing in the instant case by directly dealing with Sergeant Robert Alder regarding the date of eligibility for the promotional examinations in violation of the CMPA in this case and PERB should adopt that finding in this case.

III. MPD Response to FOP Exceptions.

First, in response to FOP's assertion that the Hearing Examiner erred in finding that MPD did not refuse to bargain, MPD states that FOP never requested to bargain after its March 25, 2009 proposals were rejected as non-negotiable. In addition, MPD also states that FOP submitted no other proposals for consideration.

Second, in response to FOP's assertion that it did not waive its right to bargain over the proposed changes to the bargaining process, MPD says that FOP is merely disagreeing with the Hearing Examiner's finding. Citing *American Federation of Government Employees, Local 631, Police Department Labor Committee v. District of Columbia Water and Sewer Authority*,²⁸ MPD states the "[...]Board has consistently held that mere disagreement with the Hearing Examiner's findings of fact do not constitute a valid exception or support a claim of reversible error. MPD points out that FOP acknowledges in its Exceptions that the Hearing Examiner applied the correct "clear and unmistakable" waiver standard but it disagrees with the Hearing Examiner's conclusion.

²⁵ R&R at 5.

²⁶ R&R at 5.

²⁷ R&R at 6.

²⁸ 59 D.C. Reg. 6050, Slip Op. No. 1008 at 10, PERB Case No. 08-U-48 at 8 (2012). See also, *Hoggard v. District of Columbia Public Schools*, 46 D.C. Reg. 4837, Slip Op. No. 496, PERB Case No. 95-U-20 (1996).

Third, in response to FOP's assertion that the Hearing Examiner erred in finding that its training and educational proposals were not appropriate issues for impact and effects bargaining, MPD states again that FOP is merely disagreeing with the Hearing Examiner.²⁹ MPD states further that FOP's proposals including additional training and education were not impact and effects proposals and MPD had no obligation to bargain over FOP's unrelated proposals.

Fourth, in response to FOP's objection to the Hearing Examiner's finding that FOP did not properly put MPD on notice of the direct dealing and bypassing the Union allegation, MPD states FOP was merely repeating post hearing brief arguments and disagreeing with the Hearing Examiner's findings.³⁰ MPD points out that PERB has not adopted a "notice pleading" standard as urged by the FOP but requires the FOP to include all the legal and factual claims alleged to have been violated in the Complaint.

Fifth, in response to FOP's exception to the Hearing Examiner's finding that MPD did not engage in direct dealing and bypassing the union in violation of the CMPA, MPD says that FOP's reliance on statements by the Hearing Examiner in PERB Case No. 09-U-50 is misplaced. In that case, there was no allegation that Sergeant's Alder's memorandum was direct dealing, thus it is inappropriate to rely on the Hearing Examiner's statement. In addition, MPD states that FOP's mere disagreement with the Hearing Examiner's interpretation of evidence is not a proper basis to overturn the Hearing Examiner's decision.

IV. Analysis

A. MPD fulfilled its duty to bargain.

Under D.C. Official Code § 1-618.8 agencies may exercise certain management rights that are non-negotiable. The Board has held, however, that under D.C. Official Code § 1-618.8(a) management's rights do not relieve an agency of its obligation to bargain with the exclusive representative of its employees over the impact and effects of, and procedures concerning, the implementation of management right decisions.³¹ "It is well-settled Board precedent that when a union requests impact and effects bargaining, an agency is required to bargain before implementing the change."³² In *American Federation of Government Employees, Local 631 v. District of Columbia Department of General Services*³³, policies concerning management rights about criminal background checks, traffic record checks and drug and alcohol testing for safety sensitive positions were at issue. The Board found among other things that when the D.C. Department of General Services responded point by point to Petitioner's proposals by a letter, without any face-to-face meetings, that DGS did not fail to bargain in good faith.³⁴ The Decision and Order was upheld by the District of Columbia Superior Court.³⁵

²⁹ Id.

³⁰ Id.

³¹ *IBPO, Local 446, AFL-CIO v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994).

³² Id.

³³ 60 D.C. Reg. 12068 (2013), Slip Op. No. 1401, PERB Case No. 13-U-23 (July 29, 2013). Affirmed *Civil Case No. 2013 CA 005870*(July 30, 2015).

³⁴ Id. at 7-8.

FOP cited *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*³⁶ holding that “PERB has held that once an agency begins the bargaining process, it must continue to bargain in good faith and cannot terminate bargaining by asserting that the rights at issue are non-negotiable management rights.” In that case, MPD initiated negotiations about management rights and invited FOP to submit proposals in a situation where the existing collective bargaining agreement contained a provision that restricted management’s right to assign work. MPD submitted a counterproposal and then refused to bargain over the proposals asserting that they infringed upon management rights. In that case, the Board said “MPD should not invoke its management rights to justify its unilateral termination of impact and effects bargaining once it engaged in that process.”³⁷ Under the unique circumstances of that case, the Board held that MPD could not lawfully terminate bargaining at that point in the process, with MPD’s counterproposal still on the table to be discussed. To the extent that FOP seems to believe that impact and effects bargaining must proceed to impasse, the Board has held that an agency does not violate its duty to bargain in good faith just because the parties do not reach an agreement.³⁸

In this case, after one bargaining session, FOP submitted proposals that MPD believed exceeded the scope of impact and effects bargaining and were thus considered non-negotiable. MPD’s response was not a refusal to bargain. It expressed MPD’s position on FOP’s proposals. Notwithstanding FOP’s protestations that its proposals were an extension of impact and effects bargaining, the Hearing Examiner found that the proposals “exceed[ed] the scope of permissible impact and effect proposals.”³⁹ Additionally, the impact and effects bargaining was initiated by FOP and it did not seek further bargaining after receiving MPD’s response to its proposals. In the absence of a timely request to bargain by the union, an agency does not violate the CMPA by not engaging in bargaining.⁴⁰

Because MPD responded to FOP’s subsequent proposals as non-negotiable and beyond the scope of impact and effects bargaining, MPD responded to everything that was presented for consideration by FOP. There is no evidence that FOP sought to engage in further bargaining or that MPD refused to bargain as alleged by the union. Consequently, we conclude that because there was impact and effects bargaining between FOP and MPD on March 19, 2009, MPD did not prematurely terminate impact and effects bargaining with FOP.

B. MPD did not violate the Act by unilaterally making changes in the promotional process.

³⁵ Id.

³⁶60 DC Reg. 9212 (2013), Slip Op. No. 1391, PERB Case Nos. 09-U-52 & 09-U-53 (May 28, 2013)

³⁷ Id. at 23. The Board observed in fn 4 regarding management rights under the 2005 amendment to the CMPA that “management may not repudiate any previous agreement concerning management rights during the term of the agreement.”

³⁸ *AFGE, Local 383 v. D.C. Department of Disability Services*, 59 D.C. Reg. 10771 (2012), Slip Op. No. 1284 at 4, PERB Case No. 09-U-56 (June 21, 2012). See also, *American Federation of State, County and Municipal Employees, District Council 20, Local 2401, AFL-CIO and D.C. Child and Family Services Agency*, 61 D.C. Reg. 12856 (2014), Slip Op. No. 1497, PERB Case No. 10-I-06 (November 20, 2014).

³⁹ R&R at 5.

⁴⁰ *D.C. Nurses Association v. D.C. Department of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012).

PERB has held that a party may contractually waive its right to bargain about a subject. The D.C. Superior Court has noted that a party to a CBA can waive a statutory right through clear and unmistakable language in the agreement.⁴¹ The Board has held that a waiver of a right to bargain must be clear and unmistakable.⁴²

The Hearing Examiner found that “the Respondent did not violate the Act with respect to its unilateral implementation of the time-in-grade requirements and methods of evaluating and determining qualifications for promotional examinations for sergeants, lieutenants’ [sic] and captains.”⁴³ Relevant provisions of the CBA include the right to “direct the employees in the Department,” to “alter, rearrange, change, extend, limit or curtail its operations or any part thereof,” to “determine the qualifications of employees for appointment and promotion,” and to “formulate, change or modify Department rules, regulations and procedures.”⁴⁴ As stated by the Hearing Examiner, these “provisions of the management rights clause taken together explicitly authorized the Respondent’s unilateral action” to make changes to the promotional process.

Specifically, Article 4 of the CBA, which is the management rights clause, states in pertinent part:

“The Department shall retain the sole right, authority, and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the Metropolitan Police Department in all aspects including, but not limited to, all rights and authority held by the Department prior to the signing of this agreement. Such management rights shall not be subject to the negotiated grievance procedure or arbitration. The Union recognizes that the following rights, when exercised in accordance with applicable laws, rules and regulations, which in no way are wholly inclusive, belong to the Department: ...

4. To hire, promote, transfer, assign and retain employees in positions in the Department; ...

7. To determine the qualifications of employees for appointment, promotion, step increases, and to set standards of performance, appearance and conduct;”⁴⁵

In its exceptions, FOP states that it did not clearly and unmistakably waive its right to bargain over the changes in the promotional process. By that, FOP appears to assert that there was not an explicit management right addressing the promotional process. Such specific language is not required as the Hearing Examiner suggested above when he stated that several

⁴¹ *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, Slip Op. No. 1478, PERB Case No.07-U-10 (June 9, 2014)

⁴² *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 41 DC Reg. 1585 (1994), Slip Op. No. 297 at p. 5, PERB Case No. 90-U-23 (March 17, 1992).

⁴³ R&R at 5.

⁴⁴ R&R at 5.

⁴⁵ CBA, Article 4, Management Rights, page 2.

provisions of the management rights clause taken together authorize unilateral action by management.

- C. The Hearing Examiner relied on contract language in the CBA and concluded that setting promotion qualifications is a management right and that FOP clearly and unmistakably waived its right to bargain on that issue. Based on our review of the record, we agree with the Hearing Examiner and find that Respondent did not violate the Act by unilaterally making changes in the promotional process without first bargaining with the Union.

C.FOP's proposals exceeded the scope of permissible impact and effects bargaining.

The Board has held that “an exercise of management rights does not relieve the employer of its obligation to bargain with respect to impact and effect, and procedures concerning the exercise of the management rights decisions.”⁴⁶ In this case, FOP communicated its desire to engage in bargaining.⁴⁷ MPD accepted FOP’s request to bargain. It is undisputed in the record that the parties held an impact and effects bargaining session on March 19, 2009.

Thereafter, the FOP requested information related to the promotion process and made significant proposals about how MPD should train its officers so they would have a better understanding of labor relations, MPD regulations, supervisory skills, administrative processes, public speaking and writing skills. In addition, FOP wanted lieutenants to remain in grade for seven years before being eligible to sit for the captain’s examination. These are not subjects that flow naturally from proposed changes to the time-in-grade requirements for promotion. Training of officers is related to job performance after senior level officers have been promoted, and not impact and effects bargaining about the promotional process. Impact and effects bargaining, here, should be about the proposed changes to the promotional process and not any other subject about which FOP desired to bargain.

FOP’s argument that the union’s training and education proposals are not covered by the management rights clause is irrelevant. The point is that training and education is not a proper subject of impact and effects bargaining relative to the proposed change in the promotional process. Cases cited by FOP do not make this distinction, do not address the impact and effects situation, and do not apply in this proceeding. Consequently, we conclude that MPD was correct when it did not respond to FOP’s training proposals.

There was impact and effects bargaining between the parties. There is no requirement that agreement be reached or that there be continuing sessions. It appears FOP wanted to continue to bargain about other terms in the contract and wanted to use impact and effects

⁴⁶AFGE, Local 1403 v. District of Columbia Office of Corporate Counsel, Slip Op. No. 709 at p.6, PERB Case No. 03-N-02 (July 25, 2003); *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 41 D.C. Reg. 232 (1994), Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (May 27, 1992); *Washington Teachers Union, Local 6, AFL-CIO v. District of Columbia Public Schools*, 38 DCR 2654 (1991), Slip Op. No. 271, PERB Case No. 90-U-28 (April 2, 1991).

⁴⁷The record is clear that FOP made a timely request to engage in impact and effects bargaining as is required by *District of Columbia Nurses Association v. District of Columbia Department of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (April 25, 2012).

bargaining to try to reopen the contract.⁴⁸ A proposal that is not within the scope of impact and effects bargaining is non-negotiable.⁴⁹ Further, the training of lieutenants and captains has nothing to do with FOP unit members. In light of the above, MPD engaged in impact and effects bargaining with FOP, before implementing changes to a management right and thus did not violate Section 1-617.04(a)(1) and (5). Therefore, the Complaint as to this issue was denied by the Hearing Officer. We agree.

D. FOP's Complaint did not adequately put MPD on notice that it was being charged with direct dealing and bypassing the union.

PERB Rule 520.3(d) requires a complaint to have a “clear and complete statement of the facts constituting the alleged unfair labor practice , including date, time and place of occurrence of each particular act alleged, and the manner in which D.C. Official Code 1-618.4 of the CMPA is alleged to have been violated.” The Board may not rule on allegations that are not properly before it.⁵⁰

FOP claimed that the complaint’s language in paragraphs 3, 15 and 16⁵¹ placed MPD on notice that it was being charged with a violation. FOP considered MPD’s failure to refer Sergeant Alder’s “Request for reconsideration of the eligibility requirements for the 2009 Promotional Process,” to the union and its subsequent approval of the request was direct dealing with a unit member and bypassing the union, and was an unfair labor practice in violation of D.C. Official Code §1-617.04(a).

The Hearing Examiner found that “the term ‘improper interference’ and repeated references to the term refusal to bargain, did not adequately provide the Respondent with notice that it was being charged with direct dealing and bypassing the Union.” The Hearing Examiner further noted that “the ULP Complaint does not contain any language that the Respondent is being charged with direct dealing with a bargaining unit employee and bypassing the Union.”⁵² There was no language that connected the “improper interference” mentioned in Paragraph 3 to the statements of fact in Paragraphs 15 and 16. In fact, the “improper interference” reference in Paragraph 3 specifically states “improper interference with Complainant’s rights to participate in negotiating the training and time-in-grade requirements

⁴⁸ Id. See also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454-5, 77 S. Ct. 912, 916-17 (June 3, 1957) – Contract will not be abrogated because one party is unhappy with a term and would prefer to negotiate a better arrangement.

⁴⁹ *Fraternal Order of Police/Department of Corrections Labor Committee v. District of Columbia Department of Corrections*, 49 DC Reg. 11141 (2002), Slip Op. No. 692, PERB Case No. 01-N-01 (September 30, 2002).

⁵⁰ *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 61 DC Reg. 8003 (2014), Slip Op. No. 1316 at pp. 5-6, PERB Case No. 09-U-50 (August 24, 2012).

⁵¹ ¶ 3 “... Respondent’s refusal and failure to bargain and improper interference with Complainant’s rights to participate in negotiating the training and time-in-grade requirements and methods of evaluating and determining qualifications for promotional examinations ...”

¶ 15 “On May 1, 2009, Detective Sergeant Robert Alder, requested a special exception to the 4-2-1 year rule for the 2009 Promotional Process to enable thirty sergeants to be eligible to participate in the 2009 Promotional Process.”

¶ 16 “On May 6, 2009, without bargaining, the MPD unilaterally changed the 4-2-1 rule to allow the exception requested by Detective Sergeant Robert Alder.”

⁵² R&R at 5-6.

and methods of evaluating and determining qualifications for promotional examinations presently scheduled to be administered on July 29, 2009.” There is no mention of direct dealing or bypassing the union. FOP made the same arguments to the Hearing Examiner in its post hearing brief. Absent sufficient notice in the complaint to MPD and the Hearing Examiner about what was being alleged to be a violation, PERB is prohibited from considering the matter.⁵³ FOP seemed to be of the belief that with various elements of the charge at different places in the Complaint, the MPD should have been able to see the connection. We agree with the Hearing Examiner that the terms in the Complaint do not provide adequate notice.

PERB upholds Hearing Examiner’s findings and conclusions when they are reasonable, supported by the record, and consistent with precedent. A mere disagreement with the Hearing Examiner’s findings is not a basis for a reversal of findings that are fully supported in the record. The Board concludes MPD did not violate CMTA because FOP did not clearly state in its Complaint that MPD was being charged with direct dealing and bypassing the union.⁵⁴

Finally, FOP asserts that language by a Hearing Examiner in an unrelated case should resolve the issue of notice to the MPD in this case. Hearing Examiner Arline Pacht in PERB Case No. 09-U-50 found that MPD engaged in direct dealing in the instant case by receiving a May 1, 2009 communication from Sgt. Robert Alder and responding to it without communicating with FOP. That case concerned a May 21, 2009 email that the Chief of Police sent to the entire police force, and not the May 1, 2009 letter from Sgt. Alder and MPD’s subsequent action of expanding the eligibility dates for the promotional examination that is the subject of the instant case. The Board declined to adopt Hearing Examiner Pacht’s recommendation that MPD had violated the CMTA by expanding the eligibility dates after responding to Sgt. Alder’s memorandum because there was no such allegation in that complaint. Accordingly, FOP’s reliance on the Hearing Examiner’s unsupported statement in that case does not help it here.

V. Conclusion

Based on the foregoing, FOP’s allegations that MPD refused to bargain and to negotiate about the training, time-in-grade requirements, and methods of evaluating and determining qualifications for promotional examinations and that it refused to engage in impact and effects bargaining are dismissed.

We agree with the Hearing Examiner that there was no violation of the Act concerning direct dealing or bypassing the Union because the allegation was not properly raised in the Complaint.

ORDER

⁵³ Id. See also, *Gina H. Douglas v. Sharon Pratt Dixon and The American Federation of State, County and Municipal Employees, District Council 20*, Slip Op. No. 315, PERB Case No. 92-U-03 (June 10, 1992).

⁵⁴ Also in its Exceptions, FOP sought to address the merits of whether MPD engaged in direct dealing and bypassing the union in violation of the CMTA. In view of the finding that this allegation was not properly pleaded, the matter is moot and there is no need to consider MPD’s behavior. *AFGE v. DC PERB*, Case No. 2013 CA 005870 P (MPA)(D.C. Sup. Ct. Jul 30, 2015) at 6.

IT IS HEREBY ORDERED THAT:

1. Petitioner's unfair labor practice complaint is dismissed.
2. Pursuant to Board Rule 559.1, 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 Members Keith Washington, Yvonne Dixon and Ann Hoffman.

October 29, 2015

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-34, Opinion No. 1552, was served by File & ServXpress on the following parties on this the 30th day of October, 2015.

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