Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/ Department of Corrections Labor Committee	
Petitioner	PERB Case No. 20-U-24
	Opinion No. 1744
v.	Motion for Preliminary Relief
District of Columbia Department of Corrections[1]	
Respondent	

Decision and Order

I. Statement of the Case

On April 6, 2020, the Fraternal Order of Police/Department of Corrections Labor Committee (Union) filed an Unfair Labor Practice Complaint (Complaint) against the District of Columbia Department of Corrections (Agency). The Union alleges that the Agency violated the Comprehensive Merit Personnel Act (CMPA) through its actions in response to the coronavirus pandemic (COVID-19). The Union contemporaneously filed a Motion for Immediate Preliminary Relief (Motion).

On April 8, 2020, the Executive Director of the Public Employee Relations Board requested briefs from the parties on specific issues related to the pending Motion. The Union and the Agency each filed a brief on April 14, 2020. On April 20, 2020, the Board heard oral

[1] Section 1-617.04 of the D.C. Official Code provides that the "District, its agents, and representatives" are prohibited from engaging in unfair labor practices. The Board has held that suits against District officials in their official capacity should are treated as suits against the District. Therefore, the Board will dismiss Muriel Bowser and Quincy Booth from these matters. *See FOP/MPD Labor Comm. v. MPD*, 59 D.C. Reg. 6579, Slip Op. No. 1118 at p. 4-5, PERB Case No. 08-U-19 (2011); *see* also *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. D.C. Pub. Emp. Relations Bd.*, Civ. Case No. 2011 CA 007396 P(MPA) (D.C. Super. Ct. Jan 9, 2013).

arguments.[2] Considering the pleadings and arguments of the parties and for the reasons stated herein, preliminary relief is granted, in part, as described.

II. Background

On March 11, 2020, the Mayor of the District of Columbia issued an Executive Order declaring a state of emergency in response to the public health emergency caused by COVID-19.[3] On March 17, 2020, the Council of the District of Columbia enacted the COVID-19 Response Emergency Amendment Act of 2020, (COVID-19 Emergency Act), which amended the District of Columbia Public Emergency Act and provided the Mayor with enumerated personnel powers to address COVID-19.[4] The language of the new section states in pertinent part:

> Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.*) ("CMPA") or the rules issued pursuant to the CMPA, . . . or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:
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> (A) Redeploying employees within or between agencies;
> (B) Modifying employees' tours of duty;
> (C) Modifying employees' places of duty;
> (D) Mandating telework;
> (E) Extending shifts and assigning additional shifts;
> (F) Providing appropriate meals to employees required to work overtime or work without meal breaks;
> (G) Assigning additional duties to employees;
> (H) Extending existing terms of employees;
> (I) Hiring new employees into the Career, Education, and Management Supervisory Services without competition;
> (J) Eliminating any annuity offsets established by any law; or
> (K) Denying leave or rescinding approval of previously approved leave.[5]

On March 25, 2020, the Union sent a letter to the Director of the Agency that communicated concerns about the conditions inside the D.C. Jail[6] and requested bargaining

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[2] The Union was represented by Ann-Kathryn So, Hannon Law Group LLP. The Agency was represented by Michael Kentoff, District of Columbia Office of Labor Relations and Collective Bargaining.
[3] Mayor's Order 2020-045 (March 11, 2020).
[4] COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-0247 (March 17, 2020).
[5] COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-0247 Sec. 301(b)(4) (2020) (codified as D.C. Code § 7-2304(b)(15)-(16) (West 2020)).
[6] FOP ULP Compl. Ex. F. Examples of the conditions include a lack of screening of incoming inmates, insufficient PPE, insufficient ability to wash hands, insufficient social distancing, insufficient cleaning of facilities, lack of suitable quarantine, and potential exposure to COVID-19.

over the terms and conditions of employment for the Union members.[7] The request for bargaining proposed several health and safety measures and requested bargaining over subjects that may arise as the pandemic changes.[8] The Agency did not respond to the request for bargaining.

On April 3, 2020, the Department of Corrections changed its policies to transition bargaining unit members from an 8-hour to a 12-hour shift and to eliminate official time[9] for Union representatives.[10] In response to these actions, the Union filed the instant Complaint.[11]

III. Discussion

Before the Board is the Union's motion for preliminary relief. Board Rule 520.15 states, "The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be inadequate." In order to grant a motion for preliminary relief, at least one of these conditions must be met. It is within this framework that the Board considers the Agency's arguments and actions in determining whether to grant the Union's motion for preliminary relief.

A. Positions of the Parties

The Union asserts that the Agency violated the CMPA by refusing to bargain over health and safety and working conditions, the elimination of official time, and the implementation of a 12-hour shift.[12] The Union acknowledges that the Council of the District of Columbia (Council) passed legislation that empowered the Mayor to take actions necessary to ensure the safe, effective, and efficient operation of the District Government.[13] However, the Union argues that the Agency is not exercising its authority in a manner that is consistent with the COVID-19 Emergency Act.[14] The Union argues that the state of emergency does not override the presumption of negotiability and that no provision of the Mayor's Orders or COVID-19 Emergency Act permits the Agency to refuse to bargain.[15]

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[7] FOP ULP Compl. Ex. F.
[8] FOP ULP Compl. Ex. F.
[9] Official time allows certain designated union officials to engage in representational activities on behalf of a union during their paid work hours. Official time is provided for in the collective bargaining agreement between these parties.
[10] OLRCB Br. Ex. 3.
[11] On April 20, 2020, the FOP supplemented its oral argument brief to provide additional exhibits. These exhibits were accepted by the Board and discussed without objection. This material will be cited as FOP Am. Br.
[12] FOP Br. at 2-4.
[13] FOP Br. at 8.
[14] FOP Br. at 8.
[15] FOP Br. at 12-15.

The Agency asserts that, in response to the declared state of emergency, it deliberated on the measures needed to fulfill its mission, and then unilaterally implemented the transition to a 12-hour shift and the suspension of official time during the state of emergency.[16] The Agency asserts that it is not required to bargain because of the pressing circumstances of the emergency.[17] The Agency argues that its actions were consistent with the necessary functioning of the agency and that delayed implementation would have impeded the agency's mission.[18] The Agency asserts that it has not violated the CMPA by refusing to bargain the impact and effects of its unilateral decisions. The Agency argues that the Union has not requested bargaining on either the 12-hour shift or the suspension of official time.[19]

B. The Duty to Bargain the Impact and Effects

D.C. Official Code § 1-617.08 affords certain rights to management, which are nonnegotiable.[20] However, even as to such nonnegotiable management rights, management must, upon request by the union, still bargain the impact and effects of its exercise of those rights.[21] In general, it is an unfair labor practice to refuse to bargain in good faith.[22]

Specifically, relevant to the current dispute, D.C. Official Code § 1-617.08(a)(6) states that management retains the right to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations."[23] That right must be read in conjunction with the COVID-19 Emergency Act, which contains language enumerating the personnel actions that the Mayor may take in section 301(a)(16), subsections (A)-(K).[24] The Council, by using the broad "notwithstanding clause," evidenced its intent to have the newly enacted amendment narrow the scope of the statute's earlier iteration.[25] The Board holds that the Council limited the authority of the Mayor during the pandemic emergency with respect to personnel actions and thereby limited the potential for broader action and impermissible erosion of collective bargaining rights in the name of the emergency. Therefore, the Board will treat actions enumerated in subsection (A)-(K)

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[16] DOC Br. at 2.
[17] DOC Br. at 6. See Exhibit 5 showing 166 DOC employees on administrative quarantine or self-quarantine as of April 9, 2020.
[18] DOC Br. at 7 (citing *Department of Air Force v. National Association of Government Employees*, Local R7-23, 5 FLRA 9, 11(1981).
[19] DOC Br. at 9.
[20] D.C. Official Code § 1-617.08(b).
[21] *E.g. AFSCME, District Council 20, Local 2921 v. DCPS,* 60 D.C. Reg. 2602, Slip Op. No.1363, PERB Case No. 10-U49(a) (2013) (holding 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, including the adverse impact on the terms and conditions of employment"); *but cf. AFGE, Locals 1000 et al. v. DHS et al.,* 64 D.C. Reg. 4889, Slip Op. No.1612, PERB Case No. 16-I-02 (2017) (holding that unlike the bargaining of a collective bargaining agreement the parties are not obligated to reach agreement during impact and effects bargaining. Thus, impacts and effects bargaining can never reach impasse)).
[22] D.C. Official Code §§ 1-617.04(a)(5) and (b)(3).
[23] D.C. Official Code § 1-617.08(a)(6).
[24] D.C. Code § 7-2304(b)(16) (West 2020)
[25] *UDC v. AFSCME, District Council 20, Local 2087,* 130 A. 3d 355, 359-360 (D.C. 2016).

of the COVID-19 Emergency Act[26] taken during the pandemic as management rights, and those unilateral personnel actions are permitted in response to the current emergency. As stated above, management rights are nonnegotiable but are subject to impact and effects bargaining upon request.[27]

C. The Duty to Bargain on Mandatory Subjects in the Context of an Emergency

The Board recognizes that some emergencies may call for immediate action resulting in the suspension of the duty to bargain. However, the Board, like the NLRB, adopts a narrow view in applying an emergency exception to the general duty to bargain. In *Port Printing*,[28] the NLRB explained a narrow exception to the duty to bargain during a financial emergency. The NLRB explained that the economic exigency exception is "limited to extraordinary events, which are an unforeseen occurrence, having major economic effect requiring that the company take immediate action."[29] "Absent a dire financial emergency. . . economic events such as a loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action."[30]

The facts of *Port Printing* are as follows. On September 22, 2005, an impending hurricane caused the mayor to order an immediate and citywide evacuation.[31] The company was compelled to take prompt action to respond to the hurricane and evacuation order.[32] The company closed its facility, resulting in a "forced layoff."[33] Seven days later, the owners of the company returned to the facility to survey the damage. On October 8, 2005, the company began the cleanup process and contacted customers to finish jobs. To complete these tasks, the company used several bargaining unit employees, nonbargaining unit employees, and at least one supervisor.[34]

The NLRB held that the layoff without bargaining was not unlawful because the hurricane had created an economic exigency.[35] However, the NLRB found that the company committed an unfair labor practice by failing to bargain over the impact and effects of the layoff.[36] Additionally, the NLRB found that the company committed an unfair labor practice when it failed to bargain over the decision to use nonbargaining unit employees to finish work because the time for immediate decision-making had passed.[37]

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[26] D.C. Code § 7-2304(b)(16) (West 2020)
[27] *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *DCNA v. DMH*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (20l2)).
[28] *Port Printing & Specialties*, 351 NLRB 1269 (2007), enfd. 589 F.3d 812 (5th Cir. 2009).
[29] *Id.* at 1270 (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *see Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994)).
[30] *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007) (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995)).
[31] *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007).
[32] *Id.*
[33] *Id.* All employees were out of work and it was unclear if they would return.
[34] *Id.*
[35] *Id.*at 1270.
[36] *Id.*
[37] *Id.*

The Board finds this reasoning persuasive. The Board holds that, in an instance of an extraordinary event which was an unforeseen occurrence requiring an agency to take immediate action, management has the right to take actions it deems necessary to carry out its mission. But it must bargain the impact and effects of its decisions. Moreover, if during the state of emergency, the need for immediate decision-making has passed, then management must engage in substantive bargaining over mandatory subjects of bargaining.

D. The Agency's Implementation of the 12-Hour Shift was a Nonnegotiable Management Right.

The COVID-19 Emergency Act and the law enacted by the D.C. Council authorized management to make the decision to transition to a 12-hour shift. That decision is a nonnegotiable management right. Notwithstanding the non-negotiability of a management right, a union has the right to impact and effects bargaining over a management right when it makes a timely request to bargain.[38] An unfair labor practice is not committed until there is a request to bargain and a "blanket" refusal to bargain.[39] Absent a request to bargain and a blanket refusal, management does not violate the CMPA by unilaterally implementing a management rights decision.[40] However, even a broad, general request for bargaining "implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable."[41] Here, the Union demanded bargaining on March 25, 2020, before the Agency began implementing changes unilaterally.[42] After receiving notice of the change, the Union repeated its demand to bargain on April 6, 2020.[43]

The Agency asserts in its brief and in its oral arguments that it does not have a duty to bargain. The Agency's blanket refusal to recognize its bargaining obligation constitutes clear-cut and flagrant conduct. Based on the record and arguments before the Board, the Union is likely to establish a violation of the CMPA. The Agency's refusal to bargain the impact and effects of the transition to a 12-hour shift interferes with the Board's processes because the Board would not be able to provide an adequate remedy if the Union had to wait until the pandemic.

E. The Subjects of Official Time and Health and Safety are Mandatory Subjects of Bargaining

In its Motion, the Union asserts that the Agency committed an unfair labor practice by failing to bargain over the elimination of official time and health and safety working conditions.[44]

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[38] *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *DCNA v. DMH*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (20l2)).
[39] *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015) (citing *FOP v. DOC*, 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002)).
[40] *AFSCME District 20 and Local 2901 v. DPW*, 62 D.C. Reg. 5925, Slip Op. No. 1514 at 4, PERB Case No. 14-U-03 (2015).
[41] *NAGE, Local R3-06 v. WASA*, 47 D.C. Reg 7551, Slip Op. No. 635 at 6, PERB Case No. 99-U-04 (2000).
[42] FOP ULP Compl. Ex. F
[43] FOP Am. Br. Ex. A.
[44] FOP ULP Compl. at 15.

The Agency asserted in its brief and during oral arguments that the Agency has no duty to bargain due to the pandemic emergency. The Board finds that the subjects of official time, as well as health and safety conditions of employment, are mandatory subjects of bargaining and the Agency is not relieved of its duty to bargain because of the pandemic.

The Agency's refusal to engage in bargaining over the unilateral elimination of official time for union representatives likely constitutes a repudiation of the collective bargaining agreement and a refusal to bargain in good faith.[45]

Moreover, the elimination of official time seriously impedes the union from performing its representational work at precisely the time when representation is most critical.[46] It strikes at the heart of collective bargaining. The COVID-19 Emergency Act did not create a management right to eliminate official time. Thus, the Agency likely had a duty to bargain before implementing that change. The Agency's conduct is clear-cut and flagrant. Based on the record before the Board, the Union is likely to establish a violation of the CMPA. The Agency's conduct interferes with the Board's processes and the Board's ultimate remedy may be inadequate.

The Agency also refused to engage in bargaining[47] over health and safety conditions arising from the pandemic. In its brief, the Agency argued that the Union waived its right to bargain over health and safety working conditions under Article 2 of the parties' collective bargaining agreement. Article 2 incorporates, by reference, the statutory language of D.C. Official Code § 1-617.08 and all applicable laws, rules, and regulations. In light of the limitations in the COVID-19 Emergency Act, this does not constitute a "clear and unmistakable" waiver of the Union's right to bargain conditions related to the health and safety of its members.[48] The Agency asserts that it has "communicated" with the Union and has adopted some of the Union's proposals, but this does not satisfy the requirement of the CMPA to bargain with the employee's duly-elected exclusive representative over such a critical issue as health and safety conditions during a pandemic. Here, the Agency's conduct is clear-cut and flagrant, based on the Agency's own assertions in its brief and oral arguments. The Union is likely to establish a violation of the CMPA. The Agency's conduct interferes with the Board's processes and the Board's ultimate remedy may be inadequate.

F. Preliminary relief is warranted

As stated above, Board Rule 520.15 provides: "The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted where the Board finds that the conduct is clear-cut and flagrant; or the

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[45] *AFSCME, District Council 20, Locals 1200 et al. v. Department of Finance Revenue at al.*, 46 D.C. Reg. 6513, Slip Op. No. 590 at 5, PERB Case 97-U-15A (1999).

[46] Tr. 80. Ann-Kathryn So explaining that "the Agency has not stopped engaging in activities that require representation" which include investigations, interviews, and disciplinary hearings.

[47] Tr. 108. Michael Kentoff states the agency has "no obligation" to bargain health and safety.

[48] *IBPO, Local 446 v. D.C. Gen. Hosp.*, 41 D.C. Reg. 2321, Slip Op. No. 312, 91-U-06 (1994) (holding that the "contractual reiteration of statutory rights cannot be interpreted as providing any more or any less with respect to [the] duty to bargain than what [the Board has] ruled is afforded under the CMPA").

effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be inadequate." The Board looks to the evidence supporting the request for preliminary relief, which must "establish that there is reasonable cause to believe that the [CMPA] has been violated and that the remedial purpose of the law will be served by *pendente lite* relief."[49] In determining whether to exercise its discretion to order preliminary relief, the Board need not find irreparable harm.[50]

The Agency argues that preliminary relief is unwarranted because it has been in regular contact with the Union to the extent possible under the circumstances.[51] The Agency asserts that there is no reasonable cause to believe that its actions violate the CMPA.[52] The Board disagrees. The CMPA states that "an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public."[53] . The Agency has taken the declaration of an emergency as *carte blanche* to disregard collective bargaining and to implement unilateral changes. Although the very serious nature of the pandemic calls for swift and deliberate action, the declared state of emergency does not excuse the Agency's sweeping refusal to participate in collective bargaining. The Agency's actions seriously interfere with the Board's process. The Board notes that, had the Agency included the Union in its deliberations, they would likely not be hearing this case. Due to the rapidly changing situation concerning COVID-19, the declared state of emergency, and the conditions at the D.C. Jail, the Board's ultimate remedy may be inadequate.[54] Therefore, the Board finds that preliminary relief is warranted.

IV. Conclusion

Based on the foregoing, the Board grants the Fraternal Order of Police/ Department of Corrections Labor Committee's Request for Preliminary Relief, in part.

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[49] *Id.*
[50] Id. *NAGE, Local R3-07 v. OUC,* 60 D.C. Reg. 9251, Slip Op. No. 1393 at 6, PERB Case No. 13-U-20 (2013).
[51] DOC Br. at 3.
[52] DOC Br. at 4.
[53] D.C. Official Code § 1-617.08(a)(1).
[54] Tr. 62-6. Ann-Kathryn So explaining that two bargaining unit employees died due to COVID-19. See U.S. District Court for the District of Columbia Memorandum Opinion ordering preliminary relief and describing the conditions of D.C. jail in *Banks et al. v. Booth et al.,* Civil Action 2020-0849(CKK) (April 19, 2020).

Order

1. The Fraternal Order of Police/ Department of Corrections Labor Committee's Request for Preliminary Relief is Granted in part.
2. The Department of Corrections shall immediately return Official Time to the *status quo ante.*
3. The Department of Corrections shall bargain forthwith with the Fraternal Order of Police/ Department of Corrections Labor Committee regarding health and safety during the pandemic.
4. The Department of Corrections shall bargain the impact and effects of the transition to a 12-hour shift with the Fraternal Order of Police/ Department of Corrections Labor Committee.
5. The Department of Corrections shall advise the Board within 7 days of the issuance of this decision of the actions it has taken to implement this Order.
6. This Order will be final on issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By a unanimous vote of Board Chairperson Douglas Warshof, Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

April 24, 2020
Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order on the Motion for Preliminary Relief in PERB Case No. 20-U-24, Slip Op. No. 1744 was sent by File and ServeXpress to the following parties on this the 24th day of April 2020.

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