GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Teamsters, Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,	
Complainant,	PERB Case No. 90-U-05 Opinion No. 267
v.	
District of Columbia Public Schools,	
Respondent.	

DECISION AND ORDER

On December 19, 1989, Complainant Teamsters Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board ("PERB" or Board) charging that the Respondent, District of Columbia Public Schools (DCPS), had violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Section 1-618.4(a)(1) and (5) by refusing to bargain collectively in good faith, upon request, over fiscal year 1990 (FY 90) compensation and other terms and conditions of employment for a successor agreement for EG-09 attendance counselors. On January 3, 1990, DCPS filed an Answer to the Complaint denying the commission of any unfair labor practice. By notice issued March 20, 1990, the Board ordered a hearing before a duly designated hearing examiner.

The Hearing Examiner, in a Report and Recommendation (R&R) issued on August 16, 1990, concluded that DCPS had no obligation to bargain with the Teamsters over FY 90 compensation matters, but that it had violated D.C. Code Section 1-618.4(a)(1) and (5) by not bargaining collectively in good faith over all other noncompensation terms and conditions of employment issues (R&R at pp. 6-7 and 12). [1]/ The Hearing Examiner ruled that notwithstanding his conclusion that the Teamsters had been duly

[1]/ An account of the relevant background of this case is contained in the Hearing Examiner's Report and Recommendation, a copy of which may be obtained at the Board's office.

certified as the unit employees' representative for purposes of compensation and terms and conditions bargaining, [2]/ the Teamsters "could not insist on bargaining over compensation proposals for fiscal year 1990" (R&R at 6) at the time it made its formal demand for bargaining on November 7, 1989. This conclusion was based on the Examiner's determination that the D.C. Superior Court decision in Barry v. Public Employee Relations Board, Civil Action No. 15364-80 (June 30, 1981) was controlling. [3]/ There, the court, interpreting the D.C. Code Sec. 1-618.17(b) provision that the Board of Education "shall meet with labor organization(s)... which [] have been authorized to negotiate compensation at reasonable times in advance of the District's budget-making process...," held that negotiations "must commence earlier than 10 days into the new fiscal year, a point in time which must reasonably be viewed as near the very end of the budget making process." Slip Opinion at 5. The facts here, the Examiner found, established that the Teamsters was not "certified [and thereby not authorized to negotiate compensation] until after the start of the [1990] fiscal year and its initial demand for bargaining [on November 7, 1989] was more than 5 weeks after the commencement of the fiscal year." (R&R at p.6.) [4]/

While concluding that DCPS was not obligated to bargain over FY 90 compensation, the Examiner specifically rejected arguments by DCPS that its conduct did not constitute a failure and/or refusal to bargain in good faith with respect to negotiating all other issues. In so ruling, the Examiner found that D.C. Code Section 1-618.16(a), which provides for agreements regarding noncompensation issues to be negotiated at the same time as compensation issues has application only when there exists an obligation to negotiate over both compensation and noncompensation issues. Having concluded that no such obligation existed with respect to FY 90 compensation issues, the Examiner ruled

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[2]/ In making this ruling, the Hearing Examiner concluded that an administrative oversight by the Board in not assigning a compensation unit code number to the bargaining unit at the time the Teamsters were certified did not "in any way impact upon or limit the Union's rights as bargaining representative" since the CMPA requires neither the assignment of a compensation unit code number nor that a union seek one to confer full exclusive representative status to a labor organization upon its certification. (R&R at p.5).

[3]/ Aff'd. sub nom, AFGE v. Barry, 459 A.2d. 1045 (D.C. Ct. of App., (1983)).

[4]/ The fiscal year for the District Government commences on October 1, of each calendar year.

that D.C. Code Sec. 1-618.16(a) was not applicable here. (R&R at. p. 7.) The Examiner also rejected DCPS' argument that under D.C. Code Section 1-618.17(m), it "was not required to bargain until 90 days after the assignment of the [compensation unit] number." This conclusion was based upon the Examiner's findings that the Teamsters had the right to negotiate the noncompensation issues for employees in the appropriate unit upon its certification on October 6, 1989, and DCPS had a corresponding obligation to negotiate upon receiving the Teamsters' request on November 9, 1989. (R&R at p.9.) Thus, the absence of a legitimate reason for DCPS' "decision to deliberately delay negotiations for 89 days" beyond even the nonessential assignment of a compensation unit number on January 17, 1990, exhibited DCPS's lack of good faith to bargain collectively (R&R at p. 10). The Examiner further found that DCPS' internal procedures requiring a 30-day public posting of the Teamsters' proposals "unduly delay[ed] the bargaining process and evidence[d] the lack of a good faith desire to go forward with the collective bargaining process." (R&R at p. 8.)

Finally, the Hearing Examiner rejected DCPS' contention that the issues raised by the Complaint "are matters which properly should be considered under PERB's negotiability procedures and that the unfair labor practice procedures have been improperly invoked here." The Examiner found the case relied upon by DCPS distinguishable because it was decided under an expedited negotiability procedure of a different statute, the Federal Service Labor-Management Relations Statute, 5 USC Section 7117(c). The Examiner pointed out there is no comparable provision under the CMPA and that nothing in the CMPA requires a party to "make an election of procedures." (R&R at p. 11.)

Both the Teamsters and DCPS timely filed Exceptions to the Hearing Examiner's Report and Recommendation, and each party filed a response. The Teamsters excepted to the conclusion that Barry v. Public Employee Relations Board is controlling here. (Teamsters' Exceptions 1-2.) DCPS excepted to every finding by the Hearing Examiner supporting his conclusion that DCPS failed and refused to bargain in good faith.

The Board, after reviewing the entire record, finds no merit in the exceptions filed by either party. We adopt the findings of fact and conclusions of law of the Hearing Examiner to the extent consistent with this decision and order as set forth below.

We deal first with the Teamsters' exception. The Teamsters contend that the Barry decision turned on the fact that the union there did not file its representation petition until September 30, 1980, the last day of the fiscal year, so that bargaining

could not have begun before the commencement of the new fiscal year. Here, in contrast, the Teamsters filed its representation petition almost 3 months before the end of the fiscal year. The Teamsters assert that but for "vigorous opposition by DCPS... PERB would most certainly have granted Local 639's Petition way in advance of the commencement of Fiscal Year 1990" and that compensation bargaining for that year would therefore have been timely demanded. In support of their ultimate contention, Teamsters say that "there have been many interest arbitration awards rendered in the public sector after the commencement of the fiscal year, which have effectively awarded [compensation] increases retroactively." (Union Brief in Support of Exceptions at 4 and 5.)

These arguments, the Teamsters concede, were rejected by the Hearing Examiner. We cannot conclude that DCPS' opposition to the Teamsters July 10, 1989 petition to substitute representatives distinguishes this case from Barry, a decision which we agree with the Hearing Examiner controls here.

While it may be technically unnecessary for us to reach DCPS' exceptions concerning the significance of a compensation unit number in this case, we do not rest upon that technicality but instead adopt the Hearing Examiner's rejection of this argument for the reasons cogently stated in the Report and Recommendation at 4-5 and 8-9.

Respondent also excepted to the Hearing Examiner's ruling that the lack of obligation for DCPS to bargain compensation in the circumstances here did not release DCPS from any obligation to negotiate over all other proposals contained in the Teamsters' November 7 1989 bargaining demand. And DCPS further excepted to the Examiner's finding that the Teamsters' lack of a response to DCPS' November 30, 1989 reply to the Teamsters' demand to bargain was not proof that the Teamsters were "insisting upon remaining firm on its proposals." These exceptions ignore the CMPA's mandate that "[the right of employees to participate through their duly designated exclusive representative in collective bargaining]" extends to "[a]ll matters...except those that are proscribed by this subchapter." D.C. Code Sec. 1-618.2(b)(4) and 1-618.8(b). DCPS' objection is based on its contention that D.C. Code Sec. 1-618.16(a), which provides that DCPS "shall negotiate agreements regarding noncompensation issues at the same time as compensation issues," relieved it of any obligation to negotiate noncompensation issues since, as found here, it had no obligation to negotiate compensation at the time requested, and consequently could not negotiate compensation and noncompensation issues at the same time. Section 1-618.16(a) is, however, a procedural provision concerning compensation which addresses when negotiations over compensation shall take place, i.e., at the same time

as non-compensation issues. As recognized by the Hearing Examiner (R&R at 6,7), the provision presupposes an obligation to negotiate compensation, and where, as here, external circumstances preclude a compensation bargaining obligation, DCPS' profferred reading would render the right to negotiate noncompensation issues a nullity. That right is not dependent upon D.C. Code Sec. 1-618.16(a).

Finally, DCPS provides no basis for rejecting the Hearing Examiner's finding (R&R at 6-7) that the Teamsters' lack of response to DCPS' November 30, 1989 letter was not proof that the Union was insisting upon its proposals. Indeed, the Teamsters' initial demand letter, which precipitated DCPS' November 30, 1989 letter, stated that "the Union reserves the right to add to, delete, and modify this proposal during the course of negotiations." (Union Exh. No. 5) This is not the language of insistence.

Next, DCPS excepted to the Hearing Examiner's conclusion that DCPS' rule requiring a 30-day public posting of union bargaining demands before the employer could reply was "unusual ...unduly delaye[d] the bargaining process and evidences the lack of good faith desire to go forward with the collective bargaining process" (R&R at 8). The argument was considered and specifically rejected by the Hearing Examiner (R&R at 7-8) and DCPS has not impugned his reasoning.

Next, DCPS excepts to the Examiner's finding that the Union "acquired the right as certified representative to bargain about compensation and noncompensation issues" for this unit on October 6, 1989, although no "compensation unit number" was administratively assigned by PERB until the following January (See R&R at p. 9). [5]/

The Examiner was clearly correct in the finding quoted in the preceding sentence. Two matters must be kept distinct if the

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[5]/ In a related exception, DCPS disputes the Examiner's conclusion that this determination as to dates "removes the underpinning for Respondent's defense that Section 1-618.17(m) of the District of Columbia Code permitted it to delay bargaining negotiations until April 16, 1990. [That Section] has no application to the facts presented here." (R&R at 9). For the reasons stated by the Examiner at 4-5 and 9-10, and as explained in the text following this footnote, we accept the Examiner's finding of fact. And, for the reasons he succinctly stated (R&R at 10), we agree with his conclusion that even if the cited Code Section were applicable here, it would not serve as justification for DCPS' actions.

situation here is to be understood: the first of these is the determination of a compensation bargaining unit. That is a function of the PERB under D.C. Code Sec. 1-618.16(b), and here the Board performed that function on June 20, 1988, when in PERB Case No. 88-R-02, Opinion No. 186, we explicitly stated the following (Slip Op. at 2):

> "After reviewing the entire record, the Board determines that the unit described below meets the statutory criteria set forth in D.C. Code Sections 1-618.9 and 1-618.16(b) and is appropriate for compensation and terms-and-conditions collective bargaining." (Emphasis added, unit description, which is not contested, omitted.)

In making this determination, the PERB followed its usual practice with respect to DCPS units of determining both the compensation and terms-and-conditions units at the same time.

As a consequence of the determination just described, the Board's Order in Opinion No. 186 directed that an election be held in the designated unit on the question of representation "for purposes of collective bargaining" -- that is, collective bargaining in toto, not simply for terms and conditions of employment.

And, as a consequence of the election results, the Board then went on to deal with the second matter, which is the designation of a representative. Concerning this, in the same PERB Case No. 88-R-02, on March 8, 1989, we issued Certification No. 52, entitled "Certification of Representative," which certified that Teamsters, Local 2000 had been designated by the employee majority to be their "exclusive representative for the purpose of collective bargaining concerning both compensation and terms-and-conditions matters with the employer." (Slip Op. at 1-2.) The effect of such a certification is to create in the certified representative the right to negotiate on both compensation and non-compensation matters.

Thereafter, the Teamsters sought an amendment to the PERB Certification substituting Local 639 for Local 2000. Our October 6, 1989 Opinion granting that amendment (PERB Case No. 89-R-06, Certification No. 52 (As amended October 6, 1989)) recited in its first sentence that the Teamsters' petition request concerned "the Certification of Representative for a unit previously found appropriate by the Board for collective bargaining on terms and conditions of employment" (id. at 1.) The reference, despite that description, was to our March 8, 1989 Certification described in the previous paragraph. The October description of that Certification as being only for terms and conditions of

employment was obviously an administrative error, as the Examiner pointed out (R&R at 4), but as he further explained one that could not obscure the Board's intention to do no more than substitute one local union for the other as the representative for the unit determined in June 1988 (Id.). [6]/ We think that the Examiner was entirely correct in his conclusion that the Complainant here acquired representative status carrying with it full bargaining rights on October 6, 1989 (R&R 4-5), and in view of the history of this matter, which we have laid out at probably too great length, we do not think that the DCPS can have any good faith doubt as to that fact. [7]/

We turn now to Respondent's exceptions (number 12, 13 and 16) concerning the Examiner's findings and conclusions that DCPS had failed to bargain in good faith from November 9, 1989 through April 16, 1990, including a deliberate delay of negotiations for 89 days following the January 17, 1990 assignment of a compensation unit number. Again, we think the Examiner's findings and conclusions warranted and well expressed (R&R at 10, 11-12), and hereby adopt them. [8]/ His ultimate conclusion that by this conduct the Respondent failed and/or refused to bargain in good

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[6]/ Thus, in our opinion granting the amendment, we rejected DCPS's contentions in opposition "as irrelevant and immaterial since the Petition does not seek to alter, expand or modify the existing unit, but merely to transfer it to a local of the unit members' choice...." (October 6, 1989 Opinion at 2.) Our Order there amended Certification No. 52 to substitute Local 639 for Local 2000 "as the exclusive representative of the following unit for purposes of collective bargaining." (Id., unit description omitted.)

[7]/ We think it unnecessary to belabor the point, made convincingly by the Examiner, that the issuance of a compensation unit "number" is not a D.C. Code requirement but only an administrative convenience for the Board. See R&R at 5 and 8-9. For the reasons there stated, and because of the history laid out above we cannot attribute any legal significance to the Board's error in January, 1990, when in an "Authorization" assigning a compensation unit number we incorrectly referred to the unit described in the March 8, 1989 Certification as being for non-compensation bargaining.

[8]/ Contrary to DCPS' assertion, the Hearing Examiner did not err in stating (R&R at 12) that November 9, 1989 rather than November 30 of that year was the date when DCPS' failure to bargain began. As the Examiner stated (id. at 11), November 9 was "the date Respondent admittedly received the Union's demand for bargaining".

faith grows inevitably from the prior conclusions. We find it sound, well-reasoned and fully supported by the record.

Finally, DCPS has excepted to the Hearing Examiner's conclusion that under the CMPA, "both unfair labor practice and the negotiability procedures were available to the union." We concur with the Hearing Examiner that under the CMPA "the Union was not [required] to make an election of procedures." (R&R at p. 11.) [9]/

Unlike the proceeding before the court in AFGE Local 2736 v. FLRA, 715 F.2d 627 (D.C. Cir. 1983), where the union had sought a negotiability ruling from the FLRA under the expedited procedures of the governing federal statute, here the governing provisions of the D.C. Code have nothing comparable to the federal law's expedition requirement (see R&R at 10-11). Moreover, it is long-standing PERB practice approved by our highest court to decide such issues when raised in an unfair labor practice proceeding. See, e.g., Washington Teachers' Union v. D.C. Public Schools, Slip Op. No. 144, PERB Case No. 85-U-28, (1986). This was an unfair labor practice case in which the issue was whether particular DCPS decisions (including the date of the opening day of the school year for teachers) were mandatory subjects of bargaining, so that DCPS' unilateral action constituted an unlawful refusal to bargain. In affirming the Board's conclusion as to whether an unfair labor practice had been committed, the D.C. Court of Appeals viewed the matter as an exercise of the Board's "wide-ranging powers" to decide whether unfair labor practices have been committed and to make determinations in disputed cases as to whether a matter is within the scope of collective bargaining. See PERB v. Washington Teachers' Union

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[9]/ As the Examiner noted (R&R at 10 - 11), subsequent to the hearing in this proceeding the Teamsters filed negotiability appeals (PERB Case Nos. 90-N-02, -03 and -04). As our decision in that case demonstrates, the question(s) for decision in such an appeal may be different from the question(s) in an unfair labor practice proceeding. There, for example, the question was "whether or not a particular matter (the negotiability of Teamsters' compensation proposal for 1990) is negotiable" in nature (see Slip Op. No. 263, PERB Case Nos. 90-N-02, -03 and -04). Here, by contrast, the question concerning the lawfulness of DCPS' refusal to negotiate compensation for 1990 turned not on the nature of the subject matter but upon the timing of the demand. Thus, in an unfair labor practice proceeding, the negotiability of a subject and therefore the respondent's duty to bargain may well be the first question, but the final question will be whether the challenged conduct was a breach of such a duty. A negotiability appeal "pure" will not present that second question.

Local 6, 556 A.2d 508, 511, 517 (1989).

For the foregoing reasons, we adopt the recommendations of the Hearing Examiner that Respondent DCPS be found not to have acted unlawfully in refusing to bargain over compensation for FY 90 in response to the request made here, and that the Respondent be found to have violated D.C. Code Sec. 1-618.4(a)(1) and (5) by its failure and refusal to bargain on request over non-compensation matters for that year.

ORDER

IT IS HEREBY ORDERED THAT:

1. District of Columbia Public Schools (DCPS) shall cease and desist from refusing to bargain, upon request, over noncompensation issues for Fiscal Year 1990 with Teamsters Local Union No. 639, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Teamsters Local Union No. 639.)

2. DCPS shall cease and desist from interfering with restraining, or coercing, in any like or related manner, employees represented by Teamsters Local Union No. 639 in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act.

3. DCPS shall negotiate in good faith with Teamsters Local Union No. 639 upon request about noncompensation issues for fiscal year 1990.

4. Within ten (10) days from the service of this Decision and Order, DCPS, shall post the attached Notice conspicuously on all bulletin boards where notices to employees in this bargaining unit are customarily posted, for thirty (30) consecutive days.

5. DCPS shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that Notices have been posted as ordered.

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

March 5, 1991

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
	)	
International Brotherhood of Teamsters, Local 639, AFL-CIO	)	
Complainant/Union	)	
	)	
v.	)	PERB Case No. 90-U-05
	)	
District of Columbia Public Schools	)	
Respondent/School Board	)	

HEARING EXAMINER'S REPORT AND RECOMMENDATION

This proceeding before the District of Columbia Public Employee Relations Board (PERB) arises out of an unfair labor practice complaint filed by the Complainant/Union on December 18, 1989. The complaint alleges that Respondent violated Section 1-618.4(a)(1) and (5) of the District of Columbia Comprehensive Merit Personnel Act (CMPA) by refusing to engage in good faith bargaining. In an answer, duly filed, Respondent denies that it has engaged in any unfair labor practices. Thereafter, a hearing was held on April 19, 1990 before Robert J. Perry, Esq., the undersigned Hearing Examiner. At the hearing, the Union was represented by Helene D. Lerner, Esq., and the Respondent was represented by; Ellis A. Boston, Esq. The parties were given a full opportunity to examine and cross-examine witnesses and to adduce relevant evidence. At the conclusion of the hearing, Respondent elected to make oral argument. A post hearing brief was

filed by the Union and the Respondent filed a reply brief.[1]

(a) Background

The bargaining unit with which we are concerned here is described as follows:

> All Attendance Counselors in the EG-09 classification; excluding management executives, confidential employees, supervisors, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978.

On March 8, 1989, PERB certified Local 2000 of the International Brotherhood of Teamsters, AFL-CIO, as the bargaining representative for both compensation and terms and conditions bargaining for employees in the above-described unit.[2] Apparently, Local 2000 never became functional and, on July 10, 1989, Local 2000 and the Complainant Union petitioned PERB to amend the certification to substitute the Complainant (Local 639) for Local 2000. On October 6, 1989, PERB granted the petition to amend, but, in so doing, it erroneously concluded that the prior certification was for terms and conditions bargaining only, when, in fact, it was for compensation bargaining.[3] Shortly after PERB amended the

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[1]Respondent's brief is not really a reply brief, but rather, it is a late-filed post hearing brief. However, the Union did not object to its filing and the brief was accepted by PERB. Accordingly, in these circumstances, I have treated Respondent's brief as properly filed and I have given it full reconsideration.

[2]PERB Case No. 88-R-02.

[3]PERB Case No. 89-R-06.

certification, the Union had telephone conversations with the School Board, but it was not until November 7, 1989, that the Union made a formal written demand for bargaining. This demand was accompanied by a complete set of contract proposals. The School Board responded on November 30, 1989, asserting that it could not bargain concerning fiscal year 1990 compensation issues because they were received too late in the fiscal year. The School Board also cited certain internal Board procedures which would have to be complied with before the School Board would be in a position to bargain. After receipt of the School Board's letter, the Union filed an unfair labor practice with PERB. Thereafter, the parties continued to communicate by telephone and, during these conversations, the School Board advised the Union that no bargaining could take place until the Union received a compensation unit number from PERB. The Union made such a request and, on January 17, 1990, PERB assigned a compensation unit number and also certified the unit for the purpose of compensation bargaining, again erroneously concluding that the prior certifications were only for terms and bargaining.[4] Following this action by PERB, the School Board concluded that it was not obligated to commence bargaining with the Union until 90 days after the Union received the compensation unit number, relying on Section 1-618.17(m) of the District of Columbia Code.[5] As a result, the only bargaining

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[4]PERB Case No. 89-R-06.

[5]Section 1-618.17(m) provides as follows:

> When the public Employee Relations ("Board") is required to determine an appropriate bargaining unit for the purposes of compensation negotiations pursuant to Section 1-618.16, negotiations for compensation between

session prior to this hearing took place on April 16, 1990.

(b) Issues

1. When did the Union acquire the right to demand bargaining?

2. Did Respondent have a valid legal basis for delaying bargaining?

3. Are the unfair labor practice procedures the proper forum for resolving these issues?

(c) Findings of Fact

The relevant facts are not in dispute and, therefore, they may be simply stated. As previously noted, Local 2000, the Complainant's sister local, was certified as the bargaining representative in the appropriate unit on March 8, 1989. The certification clearly was for compensation and terms and conditions bargaining. Thereafter, when Local 2000 failed to become functional, the Complainant Union petitioned PERB to amend the certification by substituting its name for that of Local 2000. When PERB amended the certification on October 6, 1989, it clearly intended to do nothing more than substitute Complainant for Local 2000, but due to administrative error, it erroneously concluded that the prior certification was only for terms and conditions bargaining. How does this error affect the Union's representative status? Not at all, so far as I can see. Rights once acquired can not be inadvertently lost. PERB intended the Union would have the same rights as those enjoyed by Local 2000. Accordingly, I find that on October 6, 1989, the Union was certified as bargaining

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management and the exclusive representative of the appropriate unit shall begin no later than 90 days after the Board's determination.

representative in the appropriate unit and that its bargaining rights extended to both compensation and terms and conditions bargaining. PERB's administrative error also had another unintended effect: the unit was not given a compensation unit code number at the time the certification was amended. Again, this is a matter of no real consequence. There is nothing in the District of Columbia Code or the CMPA which requires a compensation unit code number. The number is an administrative procedure which has been adopted by PERB, so that it can monitor the compensation units in the public sector. Therefore, I find that PERB's failure to assign a compensation unit code number to the unit at the time the certification was amended does not in any way impact upon or limit the Union's rights as bargaining representative.[6]

The Union acquired the right to demand bargaining on October 6, 1989, and it made a formal demand for bargaining on November 7, 1989. Respondent replied to this demand on November 30, 1989, raising legal and procedural issues which it asserted would necessitate a delay in bargaining. Prior to the instant hearing, the parties had met on only one occasion which was on April 16, 1990.

(d) Discussion

In its response to the Union's demand for bargaining, Respondent cited a decision by the District of Columbia Superior

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[6]As will be discussed later, the Union requested that PERB assign a compensation code number to the unit on January 17, 1990, so that it could proceed with its unfair labor practice complaint. It is sufficient here to state that the Union was never under a legal obligation to seek a compensation unit code number and the lack thereof can not in any way diminish the Union's representative status.

Court, Marion S. Barry, Jr., et al. v. Public Employee Relations Board, et al.[7], which it asserts precluded the parties from bargaining over compensation proposals for fiscal year 1990. In the Barry case, the court determined that a coalition of unions which had been certified by PERB some 10 days after the beginning of the fiscal year were not permitted to bargain over employee wage adjustments for that fiscal year. Although the court's holding was intentionally narrow in scope, it is clear from the holding that negotiations concerning compensation matters which occur 10 days after the start of the fiscal year do not meet the requirement that such negotiations take place at "reasonable times in advance of the District's budget-making process." The facts in the instant case are strikingly similar in important respects to those in the Barry case. Here, the Union was not certified until after the start of the fiscal year and its initial demand for bargaining was more than 5 weeks after the commencement of the fiscal year.

I find that the Barry case is controlling here and, as a consequence, I conclude that Respondent was correct in its assertion that the Union could not insist on bargaining over compensation proposals for fiscal year 1990. This does not mean, however, that Respondent was totally released from any obligation to bargain. It should be noted that the Union sent Respondent a complete set of contract proposals at the time it made its formal demand for bargaining, but these proposals were nothing more than a starting point upon which to begin negotiations. Such a practice is common in collective bargaining negotiations. While these

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[7]Civil Action No. 15364-80; decided June 30, 1981.

proposals contained compensation as well as noncompensation items, there is not a shred of evidence to suggest that the Union was insisting on anything more than the commencement of negotiations. While it is true that Respondent asked the Union to reconsider its compensation proposals in light of the Barry case and the Union did not respond, this can hardly be taken as proof that the Union was insisting upon remaining firm on its proposals.[8]

I find that while Respondent was not obligated to bargain concerning fiscal year 1990 compensation matters, it was obligated to negotiate with the Union on all other issues. I am not unmindful of the requirement of Section 1-618.16(a) of the CMPA which provides that compensation and noncompensation issues be negotiated at the same time, but, of course, that presupposes that all such issues are bargainable. Here, under applicable law, Respondent can not be forced to bargain about 1990 compensation proposals. Therefore, such issues are not longer viable, and they are not a part of the bargaining process.

The Respondent's written response to the Union's demand for bargaining expressed the wish that negotiations begin as soon as possible, but it pointed to certain obstacles which would delay bargaining. One, which we have already discussed, was the impact of the Barry case on the Union's proposals. The other was the internal procedures which Respondent was obligated to institute prior to engaging in bargaining negotiations. Respondent's letter

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[8]We would have a completely different case if bargaining negotiations had commenced in a timely fashion and the Union insisted on bargaining over fiscal 1990 compensation issues. In those circumstances, Respondent might very well have been relieved of its obligation to bargain at that time.

indicated that these internal procedures were being implemented, but it did not indicate when they would be completed. The record evidence does add much more, other than to indicate that the internal rules required that the Board of Education approve Respondent's bargaining team and proposals and that the Union's bargaining proposals were required to be posted for 30 days to allow for public comment.

Obviously, Respondent was entitled to establish whatever internal procedures it desired, so long as these procedures did not unreasonably delay the bargaining. It is not uncommon for an agent to require specific approval from its principal. However, the requirement for a 30 day public posting of the Union's proposals is unusual, to say the very least. One can not help but speculate as to how this requirement would apply, if the Union elected to refrain from submitting its proposals until the bargaining had commenced. Would those proposals be subject to a similar 30 day evaluation period? And, what of new or modified proposals the Union offered during the course of the negotiations? There is uncontroverted evidence in the record that in prior negotiations between these parties involving other units of employees, no such requirement was imposed. In my opinion, the 30 day posting requirement unduly delays the bargaining process and evidences the lack of a good faith desire to go forward with the collective bargaining process.

It is not clear from the record whether or not Respondent's internal procedures were ever finally implemented. Presumably they were. In any case, while these procedures were being placed in motion, Respondent notified the Union that no bargaining could take

place until PERB assigned a compensation unit number. Although the Union took the position that such action was unnecessary, the Union did ask PERB to assign a compensation unit number and this request was acted upon on January 17, 1990. When Respondent was advised that a compensation unit number had been assigned, it took the position that it was not required to bargain until 90 days after the assignment of the number, citing Section 1-618.17(m) of the District of Columbia Code. The one bargaining session, prior to the instant hearing, took place on the 89th day following the assignment of the compensation unit number.

In Section (c) of this Report, I have discussed the compensation unit number issue, and I have found that PERB's administrative failure to assign such a number at the time the certification was amended did not deprive the Union of the rights to which it was entitled as certified bargaining representative. In other words, the lack of compensation unit number notwithstanding, the Union, on October 6, 1989, acquired the right as certified representative to bargain about compensation and noncompensation issues for employees in the appropriate unit.[9] I reaffirm those earlier findings. This conclusion, of course, removes the underpinning for Respondent's defense that Section 1-618.17(m) of the District of Columbia Code permitted it to delay bargaining negotiations until April 16, 1990. Obviously, if the compensation unit is to be considered as having been determined on October 6, 1989, rather than January 17, 1990 (and I have so found), then Section 1-618.17(m) has no application to the facts presented here.

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[9]This right was as I have found later modified to a certain extent by application of the Barry case.

However, even if it did apply, I would not find that it served as justification for Respondent's actions. Section 1-618.17(m) of the District of Columbia Code provides in essence that negotiations shall begin no later than 90 days after PERB's determination.[10] Respondent would interpret this language to mean that a party is under no obligation to commence negotiations until the 90th day after PERB's determination. I do not believe that the language is susceptible to such an interpretation. If the drafters intended to provide a 90 day grace period before it was necessary to commence negotiations, they would not have used the words, "no later than." Rather, I think the only plausible interpretation of the language of Section 1-618.17(m) is that negotiations are to be conducted as expeditiously as possible, but in no event are they to be delayed beyond 90 days. Certainly, I find nothing in this Section which would support Respondent's decision to deliberately delay negotiations for 89 days.

One final matter remains to be resolved. Respondent contends that the issues raised herein are matters which properly should be considered under PERB's negotiability procedures and that the unfair labor practice procedures have been improperly invoked here.[11] In support of its position, Respondent cites AFGE Local 2736 v. FLRA[12] in which the D.C. Circuit Court reversed the FLRA, finding that the Authority could not bypass the expedited review procedures for negotiability appeals because it was

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[10]See footnote 5, supra, for the language of this Section.

[11]It would appear that, subsequent to the instant hearing, negotiability appeals were in fact filed.

[12]114LRRM2356 (C.A.D.C.)

administratively more convenient to resolve the issues under the unfair labor practice procedures of the applicable statute, which in that case was the Federal Service Labor-Management Relations Statute.[13] The difference between the situation in AFGE Local 2736 and the one in the instant case is primarily that they arise under different statutes. In the former, the bargaining representative initiated the expedited negotiability appeal procedures of that statute. No comparable provision is present in the District of Columbia Code or the CMPA. Under the applicable law in this case, the Union was not forced to make an election of procedures. Indeed, it could, as it apparently has, invoke both the unfair labor practice procedures and the negotiability appeal procedures. Both avenues were available to it. Accordingly, I find that the issues presented here were properly raised under the unfair labor practice provisions of the CMPA and that Respondent's claim that they must be resolved under the negotiability appeal procedures of CMPA is without merit.

In sum, I have found that the Union's right to demand bargaining was acquired at the time of the amendment of the certification (October 6, 1989) and that it made a valid demand for bargaining on November 7, 1989. From November 9, 1989 (the date Respondent admittedly received the Union's demand for bargaining), until April 16, 1990, Respondent has refused to bargain with the Union, relying upon various legal defenses to support its actions. It is a well-settle principle of labor law that when a party refuses to bargain based upon its assertion of a legal defense, it

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[13]Title 5, United States Code, Chapter 71.

acts at its peril and, if that defense is not sustained, the violation will lie.[14] I have found here that none of the defenses offered by Respondent justified its refusal to bargain with the Union. The Union's demand on November 7, 1989, was a continuing one and Respondent's failure on November 9, 1989, and thereafter to engage in good faith bargaining was a violation of Section 1-618.4(a)(1) and (5) of the CMPA.

(e) Conclusions of Law

1. International Brotherhood of Teamsters, Local 639, AFL-CIO became the duly certified representative of the employees in the appropriate unit herein on October 6, 1989.

2. The Union presented Respondent with a valid demand for bargaining on November 7, 1989.

3. Respondent's failure and/or refusal on November 9, 1989, and thereafter to bargain in good faith with the Union was a violation of Section 1-618.4(a)(1) and (5) of the CMPA.

Recommendation

I recommend that Respondent be found to have violated Section 1-618.4(a)(1) and (5) of the CMPA by its failure and/or refusal on November 9, 1989, and thereafter to engage in good faith bargaining with the Union and, that affirmatively, Respondent be ordered to immediately commence good faith bargaining with the Union.

August 10, 1990
Date

Robert J. Perry
Robert J. Perry
Hearing Examiner

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[14]Cf. Henry Hald High School Association, 213 NLRB 463 (1974).