

Notice: This decision may be orally revised before it is published in the District of Columbia Register. Parties should promptly notify the office of any formal errors to that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:

American Federation of Government)
Employees, Locals 872, 1975 and)
2553, Individually and on Behalf)
of the Consolidated Unit)
Represented by AFGE Locals 872,)
1975, 2553 and 631,)

Complainants,)

PER Case No. 94-U-02
and 94-U-08
Opinion No. 439

v.)

District of Columbia)
Department of Public Works,)

Respondent.)

DECISION AND ORDER

The history and issues of these cases are set out by the Hearing Examiner in her Report and Recommendation.^{1/} The Hearing Examiner found that Respondent Department of Public Works (DPW), committed unfair labor practices by its failure to bargain in good faith over the reduction in force of bargaining unit employees.^{2/}

^{1/} The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion. These cases were consolidated for hearing and disposition in American Federation of Government Employees, Local Union Nos. 631, 872, 1975 and 2553 v. Department of Public Works, DCR _____, Slip Op. No. 306, PER Cases Nos. 94-U-02 and 94-U-08 (1994).

^{2/} The Hearing Examiner found that DPW had failed to bargain in good faith over a reduction in force (RIF) involving bargaining unit employees. Specifically, the Hearing Examiner found that while DPW met with AFGE initially and provided notice of the RIF, prior to the RIF, DPW failed to (1) bargain over the impact and effects of the RIF on the terms and conditions of bargaining unit employees and (2) provide AFGE with information concerning the RIF necessary for AFGE to carry out its function as employees' bargaining representative. The Hearing Examiner further found that the record did not establish that DPW failed to provide relevant and necessary information concerning the RIF to AFGE in response to requests made (continued...)

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No exceptions were filed to the Hearing Examiner's Report.

Pursuant to D.C. Code Sec. 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. We therefore adopt the findings and conclusions of the Hearing Examiner that DPW committed unfair labor practices in violation of the Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-618.4(a) (1) and (5) for the reasons stated in her Report. See American Federation of Government Employees, Local Union No. 2725 v. Department of Public and Assisted Housing, ___ DCR ___, Slip Op. No. 404, PER Cases Nos. 92-U-21 (1994) and Department of Administrative Services v. International Brotherhood of Police Officers, Local 445, Slip Op. 401, PER Case No. 94-U-13 (1994).^{3/}

²(...continued)

after the RIF had been implemented. Based on these findings, the Hearing Examiner concluded that while DPW failed to bargain in good faith in the manners found, its conduct did not amount to a wholesale repudiation of the parties' collective bargaining agreement in violation of D.C. Code § 1-618.8(a)(5).

In adopting these findings, we agree with the Hearing Examiner's observation that the recitation of a statutory right in the provisions of a collective bargaining agreement does not render a violation of that right a contractual matter outside the jurisdiction of the Board unless the agreement also contains a clear and unmistakable waiver with respect to that statutory right.

^{3/} We also adopt the Hearing Examiner's recommendation that the relief not include a status quo ante remedy. She concluded that under the circumstances of this case such a remedy would be inappropriate since (1) DPW's obligation attached only to the impact and effects of the RIF and there was no evidence that the results of such bargaining would have any effect on the RIF and (2) the record clearly established that the rescission of the RIF would disrupt or impair the agency's operations. The Board has weighed such factors in determining the appropriateness of such relief when the duty to bargain is limited to impact and effects. See, International Brotherhood of Police Officers, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PER Case No. 91-U-06 (1992). Compare, International Brotherhood of Police Officers, Local 446, AFL-CIO v. D.C. General Hospital, 39 DCR 9633, Slip Op. No. 322, PER Case No. 91-U-14 (1992).

Finally, we affirm the Hearing Examiner's ruling that AFGE's
(continued...)

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ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Public Works (DPW) shall cease and desist from unilaterally implementing reductions in force (RIF) without first providing notice and an opportunity, upon the American Federation of Government Employees, Local Unions Nos. 631, 872, 1975 and 2253's (Complainants') request, to bargain the impact and effect of implementing the RIFs on the terms and conditions of employment of affected employees in the Complainants' respective bargaining units.
2. Respondents shall cease and desist from refusing to promptly furnish the Complainants, pursuant to its role as employees' bargaining representative, with information relevant and necessary to bargaining over the impact and effects of RIFs on employees' terms and conditions of employment.
3. Respondents shall cease and desist from implementing RIFs without first providing notice and an opportunity, upon Complainants' request, to bargain the impact and effect of implementing RIFs upon the terms and conditions of employment of affected employees in the Complainants' respective bargaining units.
4. Respondents shall cease and desist from interfering, in any like or related matter, with the rights guaranteed employees by the CMPA, by unilaterally implementing RIFs without first providing notice and an opportunity, upon request, to bargain with Complainants the exclusive representative of affected bargaining-unit employees.
5. Respondents shall negotiate in good faith with Complainants, upon request, about the impact and effect of the implemented and the future implementation of RIFs on bargaining-unit employees' terms and conditions of employment.
6. Respondents shall henceforth cease and desist from implementing RIFs before fulfilling its obligation to bargain with Complainants, upon request, the impact and effects of implementing

³(...continued)

request for attorney's fees be denied. The Board does not possess the authority to grant such fees nor would it be in the interest of justice. University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PER Case No. 90-U-10 (1991).

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RIFs on bargaining-unit employees' terms and conditions of employment.

7. Representatives of DPW and Complainants shall meet within seven (7) calendar days of the date of Complainants' request(s) for bargaining as provided under paragraph 5 of this Order. The representatives shall meet on a daily basis (unless otherwise agreed-upon) until agreement is reached or their efforts result in impasse. Any provision of the resulting agreement between the parties or ultimate award imposed by interest arbitration concerning the impact and effects of RIFs that do not conflict with the Comprehensive Merit Personnel Act shall, at the election of Complainants, take effect retroactively to November 11, 1993, the date the RIFs were made effective. If, after 30 days of bargaining, total agreement is not reached, either party may make a request for impasse resolution concerning noncompensation impact-and-effect matters, or upon its own motion, the Board may declare an impasse pursuant to Board Rule 527.1.

8. The Board shall be notified of the date(s) of commencement of all bargaining pursuant to this Order. Respondents shall, within ten (10) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.

9. Respondents 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 accordingly.

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

July 19, 1995

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 94-U-02 and 94-U-08 was sent via facsimile and/or mailed (U.S. Mail) to the following parties on the 19th day of July, 1995.

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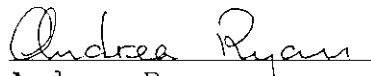
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Public
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Relations
Board

Government of the
District of Columbia



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NOTICE

TO ALL EMPLOYEES REPRESENTED BY THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION NOS. 631, 872, 1975 AND 2553 (AFGE), AT RESPONDENT THE DEPARTMENT OF PUBLIC WORKS: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. _____, PERB CASE NO. 94-U-02 AND 94-U-08.

WE HEREBY NOTIFY our employees that the Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from implementing reductions in force (RIFs) without providing an opportunity to bargain to the American Federation of Government Employees, Local Union Nos. 631, 872, 1975 and 2553 (AFGE) concerning the impact and effects on bargaining-unit employees' terms and conditions of employment.

WE WILL cease and desist from implementing RIFs without first fulfilling our obligation to bargain with AFGE concerning the impact and effects thereof on bargaining-unit employees' terms and conditions of employment.

WE WILL cease and desist from refusing to furnish, and promptly provide, AFGE with information relevant and necessary to bargain over the impact and effects of RIFs on employees' terms and conditions of employment.

WE WILL bargain collectively in good faith with AFGE over the impact and effects on employees' working conditions resulting from the implementation of RIFs.

WE WILL NOT in any like or related manner interfere with the rights guaranteed to employees by the Comprehensive Merit Personnel Act to bargaining unit employees employed by the above-captioned Respondents.

Date: _____ By: _____

Director
Department of Public

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)
)
)
AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES, LOCALS)
872, 1975 AND 2553, INDIVIDUALLY AND)
ON BEHALF OF THE CONSOLIDATED)
UNIT REPRESENTED BY AFGE LOCALS)
872, 1975, 2553 AND 631)
)
Complainants,)
)
v.)
)
DISTRICT OF COLUMBIA)
DEPARTMENT OF PUBLIC WORKS,)
)
Respondent.)

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PUBLIC EMPLOYEE RELATIONS BOARD

PERB Cases No. 94-U-02
94-U-08

REPORT AND RECOMMENDATION

I. Statement of the Case

This case comes before the Public Employee Relations Board ("Board" or "PERB"), pursuant to the District of Columbia Comprehensive Merit Personnel Act of 1978, ("the Act" or "the CMPA"), D.C. Code Sections 1-601.1 et seq. (1981), on an Unfair Labor Practice Complaint (PERB Case No. 94-U-02) filed by the American Federation of Government Employees, Local Union Nos. 872, 1972, 2553 and 631 ("AFGE" or "Complainants") on October 19, 1993. The Complainants allege that the Department of Public Works ("DPW" or "Respondents") engaged in an unfair labor practice by refusing to bargain in good faith prior to instituting a change in conditions of employment in violation of D.C. Code Sec. 1-618.4(a)(1) and (5); have repudiated and abrogated its contractual obligations to bargain concerning the reduction in force ("RIF")

in such a flagrant manner as to constitute bad faith bargaining in violation of D. C. Code Sec. 1-618.4(a)(1) and (5); and have refused to provide information necessary for Complainants to perform their representational functions in violation of D. C. Code Sec. 1-618.4(a)(1) and (5).¹ Hearing Examiner Exhibit (H.E. Exh.) #1.

On January 26, 1994, AFGE filed another Unfair Labor Practice Complaint (PERB Case No. 94-U-08) alleging that DPW refused to provide information necessary for the performance of Complainants' representational functions in violation of the D.C. Code Sec. 1-618.4(a)(1) and (5). H. E. Exh. #2. AFGE alleged that the requested information was relevant and necessary for it to perform its representational functions and its preparation of an arbitration hearing related to the RIF.

On AFGE's Motion to Consolidate Unfair Labor Practice Complaints and Motion to Amend Compliant (PERB Case No. 94-U-02), the Board consolidated the two Complaints and granted AFGE's request to amend its Complaint in a decision issued on August 9, 1994.²

Hearings were held on October 25, 1994, December 8, 1994 and January 12, 1995, at which time representatives of AFGE and DPW appeared.³ The parties were afforded full opportunity to offer evidence, to examine and cross-examine witnesses and to present argument. The parties filed post-hearing briefs on March 14, 1994.

^{1/} AFGE concurrently filed a motion seeking preliminary relief; however, the request was withdrawn before the Board had an opportunity to consider and rule upon it.

^{2/} Complainants amended its Complaint to include a status quo ante remedy.

^{3/} The DPW was represented by the Office of Labor Relations and Collective Bargaining ("OLRCB").

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommended order.

II. Background

AFGE Local Union Nos. 872, 1975 and 2553 are individually and collectively a labor organization which, along with Local 631, have been certified as the exclusive representative of certain employees of the Respondent pursuant to the Consolidated Order issued by PERB in Case No. 84-R-08. The Respondent is a District of Columbia Government entity and is the employer of the bargaining unit employees represented by AFGE.

AFGE and DPW are parties to a collectively bargained compensation agreement that was approved by the District of Columbia Council in Resolution 10-94 on July 13, 1993. H.E. Exh. #5, attachment #7. The agreement states, in relevant part, as follows:

SECTION A:

The parties recognize that the District is presently undergoing difficult financial times, that the District has notified the Unions of its intent to reduce its workforce, and that the District has agreed to negotiate with the Unions concerning the impact and effect of that reduction in force. The procedures set forth below will apply if a further reduction in force becomes necessary. This Article shall be incorporated into the applicable working conditions agreements.

SECTION B:

The following shall apply in the event of any further reduction in force:

1. The District will notify the Unions in Compensation Units 1 and

2 when it becomes aware that a further reduction in force is necessary, will notify the Unions of the scope of the contemplated action, and will provide the Unions with relevant information as it becomes available;

2. The District will give the Unions a reasonable opportunity to present alternatives to the contemplated reduction in force prior to its implementation;

3. The District will comply with the rules, regulations and procedures governing reductions in force as currently provided in the District of Columbia Personnel Manual (DPM) and the Comprehensive Merit Personnel Act (CMPA);

4. The District will bargain with each affected Union regarding the impact and effect of the proposed reduction in force;

* * * * *

In a letter dated February 8, 1993, the Complainants were advised that the District of Columbia Government ("District" or "D.C. Government") intended to reduce its workforce by conducting a RIF in accordance with Chapter 24 of the D.C. Personnel Regulations and the respective collective bargaining agreements. The letter further stated that the District was prepared to enter into "Impact and Effect Bargaining."⁴ A follow up letter was sent to AFGE stating that "Impact/Effect bargaining for all unions was scheduled for February 24, 1993." Various meetings were held between the Respondent and Complainants, during which the pending RIF was discussed. However, on April 16, 1993, AFGE was notified in a meeting, and by letter, that the DPW would not be conducting a RIF at that time. Instead, DPW reassigned affected employees to comparable vacant positions within its department, avoiding the need for a RIF. The

⁴/ Shortly thereafter, a briefing on Chapter 24 of the D.C. Regulations was conducted with all unions representing D.C. Government employees by the Office of Personnel and the Department of Employment Services.

April 16, 1993 letter further stated that the unions would be informed of any changes in the proposed plan for Fiscal Year 1993 and that the District would engage in impact/effect bargaining should there be a RIF.

III. Findings of Fact

In a meeting on July 1, 1993 with the Complainants as well as the various unions representing DPW employees, DPW Director Betty Francis advised the unions that a further reduction in the budget would require the elimination of 251 DPW positions. She advised the unions that the RIF was tentative but that it would affect all administrations within the department. In addition, Francis informed the unions that the Respondent would consider any ideas the union may have to reduce or eliminate the need for the RIF. On July 2, 1993, representatives of AFGE met with Russell Carpenter and Linda Brown from the OLRCB, during which they discussed the proposed RIF.

In a letter to Director Francis, dated July 2, 1993, Roscoe Grant, President of Local 631, Jerry Hackney, President of Local 1975, Harvey F. Roach, President of Local 872 and Michael Edwards, President of Local 2553 advised DPW of AFGE's desire to participate in impact bargaining over the proposed RIF plans. Union Exh. #1. Asserting that it wanted to carefully prepare proposals for negotiations, the Complainants, in a letter to Debra McDowell, Director, OLRCB, requested that the Respondent provide the following documents:

1. A copy of the Agencies request and justification for the RIF which was submitted to Mayor Kelly; also a copy of the Mayors approval authorization.
2. Listing of all employees in the Department of Public Works in alphabetical order by name, to contain: the official position title of record;

grade and step; series number; type of appointment, i.e. Term, Temp Appropriated, Grant, etc. Please separate by Organization units, and include CBU codes.

3. Current list of contracts being used within DPW. Please list by Bureau, and include the specific jobs that the contractors are performing.
4. Please provide the areas where the specific positions will be abolished.
5. Please provide the areas within DPW where City services will be contracted out.
6. Listing of all vacant positions within DPW.
7. Please provide a copy of the cost analysis that was used to justify the request to the Mayor for the RIF in DPW.
8. Please provide a copy of the cost analysis used to justify the contracting out of City services, (see item #5), and each of the cost analysis used to justify the existing contracts, (see item #3).
9. Please supply the number and position titles of the Term & Temp employees remaining in DPW; and number and position title of those to be included in the RIF.
10. List of all employees on details, on compensation, and on disability, within DPW.
11. Provide a copy of the Performance Evaluation for all bargaining unit members represented, also a listing by Local of bargaining unit employees with evaluations that are overdue.
12. Impact statement of working conditions of the offices to be affected by the RIF, as it relates to the remaining employees in the affected areas.
13. Provide a copy of all implementation procedures on the proposed RIF. We further request to receive a copy of any changes, modifications, etc., which would occur, to these implementation procedures.
14. Retention register(s) prior to the issuance of RIF notices.

The Union also stated that it needed to receive all of the requested information immediately, or at the very least, at the time of the next meeting on this matter.

The OLRCB, on behalf of the DPW, and AFGE did not meet during the period of July 2, 1993 and September 15, 1993. However, on September 16, 1993, they met at which time AFGE received for the first time the Respondent's response to its request for information.⁵ Tr. 49 and 151-2.⁶ The response contained some of the requested information but not all the information requested. The DPW provided the Complainants with a listing of all employees in the department by name, position title, grade and step, series number and type of appointment (Temp and Term). Transcript ("TR.") 54 and 275-78. The Complainants received two (2) listings of current contracts, which identified the contract number, contract name, contractor and type of work performed by the contractor. With respect to item #4, Jocelynn Johnson, Local 872 Executive Vice President, Secretary of the Council 211 and Executive Director of the Council of District Government Union, testified that she received a "Draft" copy of a Department of Public Works FY 94 Amended Budget Personal Services Reductions. Tr. 56. The document identified the number of bargaining unit positions affected by the RIF by local unions, administration, grades, non-union or union status and whether the position was filled or

^{5/} Although DPW prepared a response to the request for information and forwarded it to the OLRCB on July 26, 1993, the final information package was provided to the Complainants during a meeting held on September 16, 1993.

^{6/} The Respondent submitted an affidavit by Linda Brown, who was the contact person at the OLRCB regarding DPW's RIF, in its Answer to Complainants' Motion for Preliminary Relief. While that affidavit avers, inter alia, that Linda Brown advised Roach, Hackney, Edwards and Johnson on August 17, 1993 that the information package was available to be picked up, I find that the assertions therein are not reliable and probative of the facts in this case. The assertions in the affidavit were directly contradicted by testimony proffered at the hearing. Tr. 76-77, 152, 335, 338, 340 and 347. I find that this testimony, which was proffered during the hearing and subject to cross examination, is more reliable and probative than the affidavit.

vacant. Union Exh. #4 at 4. It did not identify the specific position titles of those positions which were to be abolished or identify the bargaining unit status of the positions.⁷ In response to items #5 and 8, the Respondent advised the Complainants that it did not plan to contract out any additional services in response to the position reduction plan. Union Exhibit #4 at 2. In response to the request for a copy of the cost analysis that was used to justify the RIF, the department advised the Complainants that a cost analysis of the reduction was not conducted.

The DPW did not provide a copy of the Agency's request or justification for RIF submitted to Mayor Kelly or a copy of the Mayor's approval authorization.⁸ Rather, DPW stated that it was available to meet and discuss with AFGE the justification of the Agency's proposed positions reduction plan. The Respondent did not provide a list of all DPW vacant positions (Tr. 58 and 153); the number and position titles of the Term and Temp employees remaining in DPW and those to be included in the RIF (Tr. 60); a list of all employees on details, on compensation, and on disability (Tr. 60 and 280); a copy of the performance evaluation for all bargaining unit members and a list of bargaining unit employees with evaluations that were overdue (Tr. 61 and 280); and a copy of the implementation procedures based on Part 2 of Chapter 24 (Tr. 62).

After reviewing the response and attached documentation, AFGE advised

⁷/ Johnson testified that this information was necessary for the formulation of proposals as there were numerous clerks and laborers in the department. Johnson stated that they needed to know which positions were affected by the RIF. Tr. 56.

⁸/ Johnson testified that this documentation was, however, provided to employees as part of their RIF notices. The Mayor's Approval Authorization was dated October 8, 1993. Tr. 139-40.

OLRCB that it was dissatisfied with the information provided and that it could not prepare proposals based on draft materials and/or on incomplete information. Tr. 152-53 and 348. OLRCB responded by stating that they did not have the requested information but that they would get it to AFGE once it became available. Tr. 153-54. On September 24, 1993, Johnson was faxed a copy of the FY 94 Budget Reduction Position Listing, which listed the position titles, series, grade and status of positions which were going to be abolished. Tr. 66 and 270. Union Exhibit #5 and Management Exhibit #4.⁹

Although Carpenter testified that his office was repeatedly requesting AFGE to engage in impact and effect bargaining (Tr. 250-51), DPW never responded in writing to the Complainants' official request to engage in impact and effect bargaining.¹⁰ Tr. 69, 151, 154, 189-90, 204 and 209.¹¹ Hackney, Roach and Edwards all testified that no one contacted them on behalf of DPW to schedule impact and effect bargaining in late August or early September, 1993.¹² Tr. 335, 339-40, and 344. AFGE, however, never

⁹/ According to Johnson, this information did not include the specific positions which were to be abolished. Tr. 56 and 66.

¹⁰/ Johnson testified that neither DPW nor OLRCB requested any proposals for impact and effect bargaining from July 1 through November 12, 1993. Tr. 69 and 121.

¹¹/ Local 1975 President Hackney testified that AFGE waited for DPW or OLRCB to advise them to come to the bargaining table in response to its July 2, 1993 request to bargain over impact and effect bargaining. According to Hackney, the parties' past practice had been for the OLRCB to propose a negotiation schedule. Tr. 156 and 342-43. In this case, Hackney stated that OLRCB did not schedule any negotiations.

¹²/ For the reasons previously stated, I find more reliable and credible the testimony of Hackney, Roach and Edwards than the affidavit of Linda Brown.

submitted any proposals concerning the proposed RIF. Tr. 116¹³

Sometime after September 16, 1993, Hackney was advised unofficially that the RIF would occur on November 11, 1993 and that RIF notices would be sent prior to that date. However, the Complainants were neither advised when the RIF notices were going to be issued nor supplied any additional information. Tr. 72, 190-91 and 207. Without notification to the Complainants, DPW issued RIF notices on October 12, 1993 to employees advising them that they were being separated from DPW or that they were being reassigned effective November 11, 1993. Union Exhibit #6. AFGE became aware of the RIF notices, and the information contained therein, from bargaining unit members. Tr. 72 and 140. AFGE received the Retention Register on October 15, 1993. Management Exhibit #2. Tr. 69. On October 19, 1993, the Unions filed the Unfair Labor Practice Complaint (Case No. 94-U-02).

Following the RIF, Hackney made an oral request for information regarding the revision in personnel actions and was advised by the OLRCB in early November that such information would be forthcoming. H. E. Exh. #9 at 2 and #10 at 5. Tr. 81, 86 and 262-63. On November 12, 1993, the Union received a listing of 64 employees,

¹³/ Hackney testified that AFGE was never provided a list of vacant DPW positions and that its inability to identify vacant positions affected the Union's ability to draft proposals. Tr. 154. According to Hackney, AFGE needed to know what positions were going to be vacant in order to determine if a RIF'd employee could be trained and reassigned to a particular position. Tr. 155. Instead, he testified that AFGE only received a list of vacant positions which were to be abolished. Tr. 166. Moreover, he noted that AFGE needed to know the temp and term positions as those positions must be eliminated before a RIF can occur. Tr. 174. He further stated that as the OLRCB provided material in draft form, AFGE did not get any meaningful information upon which to draft proposals. Tr. 156.

including job titles and collective bargaining units, whose positions were saved. Union Exhibit #7. Tr. 70-71. On January 3, 1994, AFGE's counsel was provided with a "Draft" list of personnel action.¹⁴ H. E. Exh. #10, attachment 3. On January 11, 1994, the Unions, through counsel, requested complete information about all employees who were affected by the RIF by January 18, 1994. The requested information was not provided and the Complainants filed the second Unfair Labor Practice Complaint on January 26, 1994 (PERB Case No. 94-U-08). H. E. Exh. # 9.

In early 1994 and after the filing the unfair labor practice complaint, the OLRCB provided the Union with a listing of bargaining unit employees who were affected by the RIF, listing the employees' collective bargaining units, positions, grades, personnel actions, new positions, new grades and location. Union Exhibit #12. Tr. 80-81, 262 and 285. On July 19, 1994, the Office of Personnel provided the Complainants with another computer print-out which purported to be a list of employees affected by the RIF.

III. Relevant Issues

Based on the allegations set forth in the Unfair Labor Practice Complaints and Respondent's answers thereto, I find that the following issues are relevant for the resolution of this dispute:

1. Whether the Respondent engaged in an unfair labor practice by refusing to bargain with the Complainants prior to implementing a RIF in violation of D.C. Code Sec. 1-618.4(a)(5);

^{14/} In the cover letter which accompanied the "Draft" list of personnel action, AFGE's counsel was advised that the OLRCB was in the process of having the list verified by the Office of Personnel. Id.

2. Whether the Respondent repudiated and abrogated its contractual obligation to bargain with the Complainants over the RIF in such a flagrant manner as to constitute bad faith bargaining in violation of D.C. Code Sec. 1-618.4(a)(5);

3. Whether the Respondent refused to provide information necessary for the Complainants to conduct its representational functions with regard to the RIF in violation of D.C. Code Sec. 1-618.4(1);

4. Whether the Respondent refused to provide information necessary for the Complainants to perform its representational function after the RIF occurred in violation of D.C. Code Sec. 618.4(a)(1) and (5); and

5. If so, whether a status quo ante remedy, or any other relief, is appropriate under the circumstances.

IV. The Parties' Contentions

A. The Complainants' Position

The Complainants argue that the Respondent committed a "per se" unfair labor practice by failing to bargain over the "effects" of the RIF. Citing Federal City College Faculty Association and Federal City College, BLR Case No. TU001, Opinion No. 15 (April 12, 1977), AFGE asserts that PERB has held that the terms "effect" and "impact" include the procedures for implementing the decision to conduct a RIF." Union's Post-Hearing Brief at 14. AFGE also relies upon court and National Labor Relations Board ("NLRB") decisions as standing for the proposition that a union must be given an opportunity to bargain on the effects of a decision affecting the possible continued employment or layoffs of bargaining unit employees.

Maintaining that the law in the District of Columbia precludes an agency from unilaterally changing conditions of employment without first bargaining with the union, AFGE argues that DPW committed an unfair labor practice when DPW unilaterally

implemented the RIF without bargaining. Asserting that it lacked the necessary information to formulate proposals, AFGE disputes the Respondent's claim that the Union had an opportunity to negotiate over the impact and effect of the RIF. In support, AFGE submits that a decision issued by the Federal Labor Relations Authority ("FLRA") in Lexington-Blue Grass Army Depot, 38 FLRA 647 (1990), on this point is instructive here. The Complainants argue that in that case, as here, the agency only gave general information about the RIF and failed to provide data upon which the union could formulate its proposals. The FLRA found a violation of the duty to provide timely and specific notice of the RIF prior to its implementation and AFGE urges PERB to make a similar finding in this case.

The Complainants further assert that DPW's failure to provide AFGE with the names of the employees who were going to be "rified" and a list of the vacant positions is an unfair labor practice as that information was necessary and relevant for the Complainants to perform its representational duties. Without this basic information, AFGE contends that it "was unable to respond in a meaningful way to the Agency's initial proposal to reduce the force by over 100 encumbered positions." Union's Post-Hearing Brief at 19. With regard to the post-RIF information, AFGE notes that the Respondent conceded the necessity and relevancy of the information requested in its Response to Unfair Labor Practice Complaint (H. E. Exh. #10) and asserts that the Respondent's argument that it had insufficient time to provide the information is not worthy of credence because the Respondent had from November 12, 1993 until January 18, 1994 to determine the personnel action which it took.

It is also the Complainants' position that inasmuch as the DPW's failure to bargain constituted a repudiation of the parties' collective bargaining agreement, DPW committed an unfair labor practice when it failed to bargain over the impact and effect of the proposed reduction. While AFGE acknowledges that PERB has ruled that contractual breaches are not to be determined by the Board on the merits, it argues that this case extends beyond a mere breach of the parties' collective bargaining agreement. Instead, the Complainants submit that DPW's actions were a repudiation of its contractual obligation. Here, AFGE argues, the Respondent was contractually obligated to bargain with the Complainants regarding the impact and effect of the proposed RIF and to give AFGE a reasonable opportunity to present alternatives to the proposed RIF before it was implemented. Citing NLRB and FLRA case law, AFGE argues that an employer's repudiation of the terms of a collective bargaining agreement constitutes an unfair labor practice under circumstances involved in this case.¹⁵

Asserting that PERB has broad authority to fashion an appropriate remedy, the Complainants argues that the appropriate remedy for DPW's failure and refusal to bargain is to reinstate the affected employees with back pay. AFGE maintains that the FLRA has issued such status quo ante remedy when "(1) the agency did not give the union adequate notice of the issue it refused to bargain; (2) the union requested bargaining; and (3) the impact on employees was broad." Union's Post-Hearing Brief at 25. Similarly, the NLRB has issued limited back pay awards to enforce its order to

^{15/} AFGE further argues that it did not waive its right to bargain over the effects of the RIF as the DPW cannot establish that there was a "clear and unmistakable waiver."

bargain. In this case, AFGE maintains, DPW failed to give it "adequate notice of its intentions through its on-going failure to provide information;" AFGE requested bargaining; and the "impact on the employees is broad." Union's Post-Hearing Brief at 26. In support, the Complainants argue that as many as 200 vacant positions could have been used to retain employees.

In concluding, AFGE argues that there is no doubt that DPW was obligated to bargain with it regarding the effects of the RIF and to provide the requested information concerning the RIF and that it failed to bargain with AFGE or to provide the data AFGE needed to commence negotiations in a timely manner. Moreover, AFGE contends that the Respondent's failure to bargain was in bad faith. As a remedy, AFGE requests that the RIF be rescinded; that DPW be required to bargain after it has provided complete information to AFGE; that adversely affected employees be awarded back pay and benefits; and that AFGE be awarded attorney's fees.

B. The Respondent's Position

The Respondent submits that it provided the Complainants with all the information that was available to it in an efficient, reasonable and timely manner. Respondent further submits that the information provided as of October 15, 1993 was sufficient for AFGE to initiate impact and effect bargaining. It asserts that a response to the Complainants' request for information was provided on July 26, 1993. According to the Respondent, that response included "1) active contracts for Fiscal Year 1993; 2) Design Engineering, Construction Administration piece; 3) Facilities Operation and Maintenance Administration contracts; 4) Chapter 24; 5) information on furloughs (DPM

Bulletin Number 24-1); 6) DPM Bulletin Number 24-2 through 24-4; 7) printout listing of bargaining unit members; 8) Personnel Services Reduction, FY 95 Amended Budget; and 9) Position Listing, FY 94 Amended Budget. The Respondent maintains that after numerous attempts by it to meet with the Complainants, a meeting was held on September 16, 1993, during which AFGE finally accepted the response to their request for information. In addition to the information provided on September 16, 1993, the Respondent asserts that AFGE was faxed a copy of the FY 1994 budget amendment, which provided the Complainants with a listing of positions slated for abolishment and noted whether the positions were filled or vacant.

The Respondent argues that the bargaining unit employees received their RIF notices on or about October 8 and that these notices specifically advised each employee how the RIF would affect him/her. The Respondent contends that was all that was required of it under Chapter 24. It was not obligated to provide notice to both employees and AFGE.

DPW maintains that AFGE received a retention register on October 15, 1993 which identified employees' competitive level; the disposition of each affected employee; their organizational unit and tenure group; their retention standing; and their service computation date. Thus, the Respondent argues, it provided AFGE with a copy of Chapter 24 of the D.C. personnel regulations; the July 26, 1993 response to AFGE's request for information; the FY 1994 amended budget and the retention register nearly one month before the effective date of the RIF. Despite this information, AFGE claimed that it needed more information and that it did not receive sufficient

information to engage in impact and effect bargaining. The Complainants' requesting of more information after having received significant documentation appears to be no more than a stalling tactic and evidence that it never intended to bargain over the RIF, the Respondent maintains.

It is also the Respondent's position that AFGE did not understand the information that they did receive. Despite Johnson's claim that the Respondent did not provide AFGE with information regarding temp or term employees, the Respondent cites to Carpenter's testimony as to where in the provided documentation the information was located. Moreover, DPW argues that after Johnson read each request and response thereto, she admitted in the hearing that DPW provided a response to eleven (11) out of fourteen (14) items requested.

Based on the foregoing, the Respondent submits that it did not fail to provide information requested by AFGE. Rather, the Respondent argues that the record indicates the opposite.

It is also the Respondent's position that it bargained in good faith when AFGE "deliberately avoided engaging in impact and effect bargaining." Employer's Post-Hearing Brief at 27. In support, the Respondent asserts that it met its obligation to notify the Complainants of the RIF plan that affected members of the bargaining unit. In contrast, the Respondent argues that every witness called by the Complainants testified that it never submitted any proposals addressing the RIF. The Respondent maintains that the Union never intended to use the collective bargaining process, but rather intended to use the legislative process to halt the implementation of the RIF.

After several meetings in which the pending RIF was discussed, the Respondent submits that the burden was on the Complainants to begin bargaining, or at the very least to submit proposals indicating their positions, on the RIF. The Respondent disputes the Complainants' claim that it did not receive sufficient information to formulate proposal. In support, it cites City of Minneapolis and Police Officers Federation of Minneapolis, 78 LA 504 (Karlins, 1982). The Respondent asserts that it provided the Complainants with a response to its request for information on July 26, 1993 but that the Complainants did not agree to meet with the Respondent to receive the requested documentation until September 16, 1993. Citing Article 17 of the parties' collective bargaining agreement, the Respondent argues that the Complainants had every opportunity to request a meeting. However, AFGE never did so. Moreover, DPW argues that AFGE requested information that it knew would not be available until the RIF was conducted (i.e. Retention Register) and made demands that it knew could not have been met (that all the information be provided before negotiation commenced).¹⁶

Moreover, the Respondent argues that in addition to the fact that Complainants received substantial information, the record indicates that there were several meetings held in reference to the RIF. The Respondent notes that meetings concerning the RIF were held in February, 1993 and on July 1 and 2, 1993, during which the Respondent

^{16/} Furthermore, DPW argues that the obligation to negotiate is not as broad as AFGE would have PERB conclude. While the Respondent is obligated to bargain with the Complainant to the extent that it is obligated to provide available information that is necessary and relevant for the Complainants to formulate and submit proposal(s), it does not extend to providing the Complainant with everything they demand. For example, the Respondent submits that AFGE did not need the performance evaluation of all employees to formulate proposals or engage in impact and effect bargaining.

distributed information which was available at that time. The Respondent maintains that the Complainants did not agree to meet until September 16, 1993 to receive the requested information.

While the Respondent gave the Complainants almost four (4) months notice of the impending RIF, the Complainants "did nothing to work with the Respondent to minimize the effect of the RIF on their bargaining unit members." Employer's Post-Hearing Brief at 36. Instead of utilizing the collective bargaining process, AFGE sought to utilize the legislative process to no avail.

As to remedy, the Respondent argues that in the event that the Hearing Examiner finds a statutory violations, the remedy should be limited to addressing the specific violation. Given AFGE's repeated refusal to submit proposals and engage in bargaining with DPW until it provided all the requested information, the broad relief requested by the Complainants is inappropriate. Even if more information was available, the results would have been the same, the Respondent argues. Accordingly, the Respondent maintains that there is no basis for rescinding the RIF notices or overturning the RIF. The Respondent urges the Hearing Examiner to dismiss the Complaints.

IV. Discussion and Analysis

A. The Respondent Engaged In An Unfair Labor Practice by Refusing To Bargain With the Complainants Prior to Implementing a RIF

PERB has consistently ruled that an agency may not unilaterally change the terms and conditions of employment of bargaining unit employees without notifying the exclusive representative of the change and without bargaining, upon demand, over the impact and effect of the change. American Federation of Government Employees Local

Union No. 2725 v. District of Columbia Department of Public Housing and Assisted Housing, ___ DCR ___, Slip Op. No. 404, PERB Case No. 92-U-21 (1994); D.C. Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, Local 709, 877, 1200, 1808, 2087, 2091, 2092, 2095, 2401, 2743, 2776, 3738, et al. v. Government of the District of Columbia, Board of Trustees, University of the District of Columbia, Board of Trustees of the D.C. Public Library and Agencies under the Administrative Control of the Mayor, ___ DCR ___, Slip Op. No. 330, PERB Case No. 92-U-24 (1992); and International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital, ___ DCR ___, Slip Op. No. 312, PERB Case No. 91-U-06 (1992).

Although the decision to implement a RIF rests solely upon the District, the impact and effect of the Respondent's decision to implement the RIF clearly falls within the Respondent's obligation to bargain.¹⁷ The District of Columbia Board of Labor Relations (BLR) recognized the distinction between the duty to bargain over the decision to implement a management's right and the duty to negotiate over the impact and effect of the implementation of a RIF in Federal City College Faculty Association and Federal City College, BLR Case No. TU001, Slip Op. No. 15 (1977). PERB reaffirmed this holding in The University of the District of Columbia Faculty Association/National Education Association and the University of the District of Columbia, ___ DCR ___, Slip Op. No. 43, PERB Case No. 43 (1982), wherein it found that an agency had a duty to bargain "with respect to the procedures for implementing

^{17/} It is undisputed that the implementation of a RIF affects the terms and conditions of employment of bargaining unit employees.

[the decision to conduct a RIF], if and when it is made, and resolving any problems arising from its impact or effect." Slip Op. No. 43 at 4. See also, U.S. Department of the Army, Lexington-Blue Grass Army Depot and Ronald D. Lewis, 38 FLRA 647 (1990).

The record in the instant case establishes that while the Respondent gave the Complainant some notice of the pending RIF, it made a cursory effort to negotiate over the impact and effect of the RIF. The Complainants were advised in the July 1, 1993 meeting with DPW that a RIF was anticipated. The next day, representatives of the OLRCB, Carpenter and Brown, met with AFGE to discuss the pending RIFs. While the Complainants discussed their displeasure with the loss of jobs, there is nothing in the record to support a finding that the discussion involved impact and effect bargaining. Indeed, following the July 2 meeting, the Complainants made a request to bargain over the impact and effect of the implementation of the RIF and shortly thereafter made a request for information in order to formulate proposals over the matter. While the Complainants' insistence to have all the requested documentation prior to commencing negotiations delayed the start of "impact and effect" bargaining, there is little question that the Respondent could have provided the requested information prior to the date on which RIF notices were issued and could have engaged in impact and effect bargaining prior to the implementation of the RIF.

The record demonstrates that RIF notices were dated October 8, 1993 and were issued on or about October 11, 1993. However, the Complainants were not provided a copy of the retention register until October 15, 1993, four (4) days after the RIF notices

were issued. Clearly, as the retention register is the document from which decisions are made as to which employees are separated and which employees are retained, the Respondent had to have had within its possession the retention register prior to the date the RIF notices were dated, October 8, 1993. As such, it was obligated to provide the Complainants with a copy of retention register and to bargain over the impact and effect of the RIF. While the Complainants avail itself of the political process in order to influence the decision to implement a RIF, it nevertheless have a statutory right and obligation to represent its members in impact and effect bargaining. Even at the eleventh hour, the Complainants, at the very least, could have negotiated the procedures by which employees would utilize to dispute the factual basis upon which the personnel actions (separation or reassignment) were based.

In so ruling, I reject the Respondents argument that the onus was on the Complainants to commence negotiations under the facts and circumstances of this case. PERB has ruled in University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, ___ DCR ___, Slip Op. No. 387, PERB Case No. 93-U-22 (1994), that a duty to bargain over the impact and effect of a change in terms and conditions of employment arises when the union makes a request to bargain. In this case, the Complainants made such a request to bargain in its July 2 letter to DPW. There is no affirmative requirement on the Complainants to present specific proposals in order to engage in impact and effect bargaining. In addition, the Complainants lacked information which could have assisted them in the formulation of proposals. For example, although the department announced in a newsletter that there were 200

positions available in the budget to fill within the Water and Sewer Utility Administration, the Respondent never provided the Complainants with a list of vacant positions. While the Respondent refused to reveal the performance evaluations based on confidentiality concerns, it never provided the Complainant with a copy of a list of employees whose evaluations were overdue. While such information would not have disclosed any confidential information, it could have assisted the Complainants in the formulation of proposals addressing the performance of these evaluations prior to the RIF. Therefore, it was the action and conduct of the Respondent which, in part, hampered the Complainants' ability to present viable proposals. See International Brotherhood of Police Officers, Local 446 v. District of Columbia, ___ DCR ___, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and International Brotherhood of Police Officers, Local 446 v. District of Columbia, *supra* at 5.

I also reject Respondent's contention that the Complainants had one (1) month to bargain after receipt of the retention register and the effective date of the RIF and failed to commence impact and effects bargaining. The obligation to bargain over impact and effect was before the Respondent implemented the RIF. The implementation of the RIF occurred when the RIF notices were issued to DPW employees. Accordingly, the Respondent violated its duty to bargain when it issued the RIF notice.

The finding that the Respondent did not meet its obligation to bargain over the impact and effect of the RIF is consistent with the FLRA decision in Lexington-Blue Grass Army Depot, 38 FLRA 647. In that case, as in the instant case, the union was not given the opportunity to negotiate over the impact or effect of the RIF prior to the

issuance of the RIF notices. The FLRA found the agency failed to notify the union as to when the RIF was to occur or when the RIF notices would be issued to bargaining unit employees and failed to provide the union with a retention register, even though the union requested to bargain over the impact and implementation of the RIF and requested an advance copy of the retention register.

For the foregoing reasons, I find that the Respondent failed to meet its obligation to bargain with the Complainants over the impact and effect of the RIF prior to implementation of the RIF in violation of D.C. Code Sec. 1-618.4(a)(1) and (5).

2. The Respondent Did Not Repudiate and Abrogate its Contractual Obligation to Bargain with the Complainants over the RIF in Such a Flagrant Manner as to Constitute Bad Faith Bargaining

Finding that the CMPA contains no provision making it an unfair labor practice for the breach of a collective bargaining agreement, PERB has ruled that it lacks jurisdiction over alleged violation of the parties' collective bargaining agreement. American Federation of Government Employees, Local Union No. 3721 v. District of Columbia Fire Department, ___ DCR ___, Slip Op. No. 287, PERB Case No. 90-U-11 (1991); and Carlease Madison Forbes v. Teamsters, Local Union 1714 and Teamsters Joint Council 55, ___ DCR ___, Slip Op. No. 205, PERB Case No. 205 (1989). The Complainants are aware of this case law and argue that the Respondent's violation of the terms of its collective bargaining agreement with the Complainant constitutes a repudiation and abrogation of its contractual obligation. For the reasons stated below, I find that the record fails to demonstrate that the Respondent's actions in this case constitute a repudiation or abrogation of the parties' collective bargaining agreement.

Contrary to the facts in Panama Canal Commission, 43 FLRA No. 120 (1992); Department of Defense, Warner Robins Air Logistic Center and American Federation of Government Employees, Local 987, 40 FLRA 1211 (1991); and Indiana and Michigan Electric Company, 284 NLRB 53 (1987), cases upon which the Complainants rely, the record in the instant case does not establish a wholesale repudiation of the parties' collective bargaining agreement. In Indiana and Michigan Electric Company, the employer outright and repeatedly refused to arbitrate any grievances on the basis that the parties' collective bargaining agreement had expired. The NLRB ruled, based on a case by case analysis, that the employer's entire course of conduct constituted a wholesale repudiation of a contractual commitment to arbitrate. In Warner Robins, supra, the FLRA ruled that it will engage in a case by case examination of the facts in each case to determine whether the nature and scope of the breach of the contract amounts to a repudiation of the obligation imposed by the agreement. 40 FLRA at 1218-19. In Warner Robins, the FLRA found that the employer's refusal to reassign a union negotiator to a day shift so that he could become part of the negotiation team was in violation of the parties' agreement and interfered with the union's right to choose its representative. The FLRA concluded that the nature and scope of the employer's "refusal went to the heart of the agreement and the collective bargaining relationship itself and therefore amounted to a repudiation of the obligation imposed by the agreement." 40 FLRA at 1220-21.

While the Respondent here failed to meet its burden to bargain with the Complainants over the impact of the RIF, there is no evidence that it engaged in a

wholesale repudiation of its contractual obligation. The Respondent met with the Complainants initially and informed them of the upcoming RIF. In addition, while the Respondent did not provide all relevant documentation requested, it did provide some of the requested information. These facts preclude a finding that the Respondent engaged in a wholesale repudiation of its contractual obligations.

For these reasons, I find that the record fails to demonstrate that the Respondent repudiated and abrogated its contractual obligation to bargain with the Complainants over the RIF in such a flagrant manner as to constitute bad faith bargaining in violation of D.C. Code Sec. 1-618.(a)(5).¹⁸

3. Respondent Refused to Provide Information Necessary for the Complainants to Conduct its Representational Functions with Regard to the RIF

The Board has ruled that an agency's obligation to bargain in good faith with the exclusive representative of its employees under D.C. Code Sec. 1-618.4(a)(5) encompasses the obligation to provide information reasonably necessary and relevant to the union's representational duties. American Federation of State, County, and Municipal Employees, Council 20 v. District of Columbia General Hospital and the District of Columbia Office of Labor Relations and Collective Bargaining, ___ DCR ___, Slip Op. No. 227, PERB Case No. 88-U-29 (1989); and University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia,

^{18/} The Respondent did not allege, nor do I find, that the Complainants clearly and unmistakably waived its statutory right to bargain over the impact and effect of bargaining by including into the parties' collective bargaining agreement the duty to bargain over the impact and effect of a RIF. See IBPO, Slip Op. No. 312 at 4.

___ DCR ___, Slip Op. No. 215, PERB Case No. 86-U-16 (1989).

The record demonstrates that the Respondent failed to provide to the Complainants a list of all DPW vacant positions; retention register; a list of all employees on details, compensation and disability; a copy of bargaining unit employees' performance evaluation and a listing of bargaining unit employees whose performance evaluations are overdue; impact statements; a copy of DPW's request and justification for the RIF and Mayor's approval authorization; and the number and position titles of Term and Temp employees remaining with the DPW and those to be included in the RIF.¹⁹

I find that all of the above-cited information is relevant and necessary for Complainants to fulfill their obligation to represent its members during the RIF process. The Union is entitled to information which will permit meaningful bargaining and/or challenges to Respondent's implementation of the RIF. See Doctors' Council of the District of Columbia v. Government of the District of Columbia, Department of Human Services, Department of Corrections and Department of Public Works, ___ DCR ___, Slip Op. No. 353, PERB Case No. 92-U-27 (1993). As previously noted, the retention register provides significant information and data upon which an employee's future employment status is determined and the vacant list assist the Complainants in assessing possible positions to which bargaining unit employees could be reassigned. In addition,

^{19/} Contrary to the Complainants' contention, the information provided by the Respondent was responsive to the request for information as stated in item #4, which requested "the area where the specific positions will be abolished." Union Exhibit #4. The reference was to the specific area and not to the position as Complainants allege.

inasmuch as performance ratings can enhance an employee's retention standing, the Complainants have an interest in assuring that all employees receive timely performance evaluations and proper evaluation ratings.²⁰ Furthermore, information concerning the status of temp and term employees; the impact the RIF will have on bargaining unit employees; the justification and authorization for the RIF; and which employees are on detail, compensation and disability are relevant and necessary to determine if the Respondent complied with its statutory and contractual obligations during the RIF process.

As the information was material and relevant to the Complainants' representational duties, the Respondent's failure to provide this information prior to the issuance of the RIF notices violated its obligation to bargain in good faith under D.C. Code 1-618.4(a)(5).²¹

^{20/} I reject the Respondent's contention that the Complainants are not entitled to a copy of the performance evaluations of members within their bargaining unit on the basis of confidentiality. The Board rejected a similar argument with regard for a request for the names and scores of all bargaining unit faculty members who received "Satisfactory" of better performance evaluations during that period. University of the District of Columbia Faculty Association/NEA, Slip Op. No. 215 at 1. The Board ruled that the union's need for the information outweighed the confidentiality concerns of the agency. Inasmuch as performance evaluation ratings play a significant role in employees' retention standing, the Complainants have a compelling interest in this matter. Accordingly, I find that the Complainants' need for such information outweighs the confidentiality concerns of the Respondent.

^{21/} While I find that all the requested information was, or should have been available to the Respondent, prior to the issuance of the RIF notices, I do not find that the production of documentation which were labeled "Draft" was inappropriate. As the Complainants in its item # 13, wherein Complainants' request included information on any changes or modification of the implementation procedures, the RIF process is a continuing process which requires constant modification.

4. Respondent Did Not Refuse to Provide Information Necessary for the Complainants to Perform its Representational Function after the RIF Occurred in Violation of D.C. Code Sec. 618.4(a)(1) and (5)

While the Respondent has the obligation to provide relevant and necessary information to Complainants under D.C. Code Sec. 1-618.4(a)(5), the record fails to demonstrate that the Respondent failed to provide information that was requested following the RIF. It is alleged in the Complaint, which Respondent admits, that following the RIF, Hackney requested information regarding the revision in personnel actions. The Complaint and the record fail to specify what exactly the Complainant requested. Therefore, the record fails to establish that the Respondent's January 3, 1994 response to this request, which provided a list of bargaining employees who were affected by the RIF in draft form, did not comply with Hackney's request for information.²² While Complainants' Counsel's letter to DPW, dated January 11, 1994, indicating that the Complainant had "been seeking a full accounting of all personnel actions that were accomplished in connection with the RIF" and specifying what information it was seeking, provides sufficient detail, there is absolutely nothing in the record to conclude that the Complainants had made a prior request for the specified information.

Moreover, the Respondent's failure to provide the information in response to the January 11, 1994 letter within one (1) week as requested does not constitute a refusal to

^{22/} I find that the production of a document which had been noted to be a "Draft", when accompanied by the statement that the information contained therein was being verified, as being in compliance with DPW's obligation to provide the requested information.

provide information. Clearly, an agency has a reasonable opportunity to respond to a request for information. Notwithstanding the fact that the personnel actions had taken place over two (2) months prior, a one (1) or two (2) week period for the information requested here did not provide the Respondent with a reasonable opportunity to respond to Complainants' request. Inasmuch as the Complainants filed the instant Unfair Labor Practice Complaint 14 days after making the request for information, Respondent did not have a reasonable opportunity to provide the information requested.²³] ✓

For these reasons, I find that the record fails to establish that the Respondent refused to provide relevant and necessary information after the RIF in order for Complainant to perform its representational functions.

5. Remedy

Upon review of the entire record, I find that the appropriate remedy in this case is the remedy issued by the Board in prior cases involving the failure of an agency to negotiate over the impact and effect of a change in conditions of employment. In D.C. Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, Local 709 et. al., Slip Op. No. 343; and Doctors' Council of the District of Columbia, Slip Op. No. 353, the Board ordered an expedited bargaining schedule and elective retroactive application of any negotiated agreement or terms imposed by interest

^{23/} The record is insufficient on this point for another reason as well. While Complainants argue that the information was needed in part for AFGE to prepare for an arbitration proceeding, there is no evidence in the record concerning the date when the arbitration was filed, the date of the arbitration hearing or the precise issue raised at arbitration. The dates of the request for arbitration and arbitration hearing are critical in determining whether the Respondents alleged delay was unreasonable and precluded the Complainants from fulfilling its representational duties.

arbitration concerning the impact and effect of a furlough not preempted by the governing law. See also, International Brotherhood of Police Officers, Local 446, AFL-CIO, Slip Op. No. 312 (1992).

A similar order would be appropriate in this case inasmuch as the Respondent has failed to meet its obligation to bargain with Complainants over the impact and effect of the RIF. That is, Respondent should be ordered to provide the Complainants with the information set forth in this decision forthwith and to engage in impact and effect negotiations pursuant to an expedited schedule. In addition, Complainants shall have the election to retroactively apply the negotiated agreement or terms imposed by interest arbitration. ✓


I have considered the Complainants' request for a status quo ante remedy and find that it is inappropriate under the facts and circumstances of this case. While the record supports a finding that Complainant has demonstrated that it has met the first four (4) factors articulated by the FLRA in Lexington-Blue Grass Army Depot, 38 FLRA at 647-9, in determining that such a remedy is appropriate, it is clear from the record that the rescission of the RIF would disrupt or impair the efficiency and effectiveness of DPW's operations. The RIF was agency-wide and was projected to affect over 250 positions, involving employees outside the bargaining unit represented by the Complainants. The rescission of the RIF would have far reaching effects beyond the bargaining unit employees involved in this proceeding and would impair the efficiency of the agency and the effectiveness of its operations, without any evidence that impact and effect bargaining will have any effect on the RIF. The more appropriate remedy is to ✓

require the parties to negotiate consistent with their statutory obligation and to retroactively impose the terms of the negotiations.

In addition, insofar as the Complainants did not seek as the remedy a request for back pay in either their Complaint or Amended Complaint, and the Respondent has not had an opportunity to respond to such a remedy, I find that it would be inappropriate to recommend that the remedy include an award for back pay at this time.

Lastly, I find that the Complainants' request for attorney's fees must be denied. The Board ruled in International Brotherhood of Police Officers, Local 446, AFL-CIO/CLC v. District of Columbia General Hospital, Slip Op. No. 322 at n. 6, that it does not have authority to award attorney's fees.

As to the remaining alleged violations of the D.C. Code Sec. 1-618.4(a)(1) and (5), the Complaint should be dismissed.


Susan Berk
Hearing Examiner

Date: May 19, 1995