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

In the Matter of:)	
)	
The National Association of Government Employees, Local R3-05)	
Complainant,)	PERB Case No. 11-U-54
v.)	Opinion No. 1605
)	
District of Columbia)	
Metropolitan Police Department,)	
Respondent.)	

DECISION AND ORDER

I. Introduction

The National Association of Government Employees, Local R3-05 (“Complainant” or “NAGE”) filed this unfair labor practice Complaint alleging that the District of Columbia Metropolitan Police Department (“Respondent” or “MPD”), violated D.C. Official Code § 1-617.04(a)(1)-(5) by failing to engage in impact and effects (“I&E”) bargaining prior to a reduction in force (“RIF”), in accordance with the parties’ collective bargaining agreement (“CBA”).¹

MPD filed an Answer to the unfair labor practice Complaint (“Answer”) denying the allegations set forth in the Complaint and requesting the Complaint be dismissed.² The Board declined to dismiss the allegations based on the pleadings and referred the case to a Hearing Examiner.³ A hearing was held on May 4, 2015 and the Hearing Examiner issued a Hearing Examiner’s Report and Recommendations on August 19, 2015. NAGE filed Exceptions to the Report alleging that the Hearing Examiner’s findings and conclusions were unsupported by the facts on the record, unreasonable, contrary to law and inconsistent with PERB precedent.⁴

For the reasons stated herein, the complaint is dismissed.

¹ Complaint at 2.

² Answer at 1-2.

³ *National Association of Government Employees, Local R3-05 v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 6920, Op No. 1217, PERB Case No. 11-U-54 (2012).

⁴ NAGE Exceptions at 1.

II. Statement of the Case

On September 1, 2011, Diana Haines Walton, MPD Director of Human Resources, notified Michael Patterson, NAGE Local R3-05 President, of MPD's plans to implement a RIF in the Office of the Chief Information Officer (OCIO). The email stated that the RIF would include the abolishment of fourteen current positions and the creation of eight new positions.⁵ Mr. Patterson responded by letter on September 2, 2011, invoking NAGE's right to I&E bargaining.⁶

On September 7, 2011, Mr. Patterson submitted a Freedom of Information Act (FOIA) request regarding the RIF. He requested the names, positions and salaries of all the Information Technology ("IT") MPD contractors.⁷ On September 13, 2011, Ms. Walton notified Mr. Patterson through a phone call that notices were going out to employees affected by the RIF on the following day. She also informed him that she would have a meeting with all affected people followed by an individual meeting with every person in her office at which point they would receive their RIF notices.⁸ Ms. Walton testified that Mr. Patterson requested to attend the group meeting as well as the individual meetings to which she had no objections. In the meetings that took place on September 14, 2011, MPD provided written notice to employees that the RIF was being conducted, effective October 14, 2011.⁹ Ms. Walton further testified that between these meetings, she and Mr. Patterson spoke about I&E bargaining and said they would be in touch. Ms. Walton sent two separate emails, one on September 28, 2011 asking to discuss the RIF and another on September 30, 2011 asking when they could meet to discuss I&E bargaining.¹⁰

On September 13, 2011, Mr. Patterson sent a letter to Mark Viehmeyer, MPD Acting Director of Labor and Employee Relations Unit, requesting a briefing prior to an I&E bargaining session. On September 14, 2011, Patterson also sent a letter to Cathy Lanier, MPD Chief of Police, objecting to the RIF notices prior to the union having the opportunity to engage in I&E bargaining. The next day, Patterson revised his FOIA request to include a listing of all IT positions, grades, classifications, required certifications for those positions and last evaluations.¹¹

On September 23, 2011, NAGE filed the present unfair labor practice complaint against MPD claiming that MPD violated the CMPA, D.C. Official Code § 1-617.04(a)(1), (2), (3), (4) and (5) when it failed to engage in I&E bargaining.¹²

On October 12, 2011, Mr. Patterson sent an email to Ms. Walton and Mr. Viehmeyer. Mr. Patterson stated that the Union was awaiting information from a FOIA request that would allow them to more effectively engage in I&E bargaining.¹³ Mr. Viehmeyer responded to the email asking Mr. Patterson to provide the information he has not yet received. On October 18, 2011,

⁵ Report at 3

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.*

Mr. Patterson responded to the email with a listing of all information he requested and later that day he was sent an email attachment from MPD's FOIA Officer with the response to his FOIA request.¹⁴

III. Hearing Examiner's Report and Recommendation

NAGE argued that MPD committed an unfair labor practice when it failed to engage in I&E bargaining after it was requested by NAGE, prior to the 2011 OCIO RIF. NAGE contended that MPD was obligated to engage in I&E bargaining prior to conducting the RIF under the CMPA.¹⁵ NAGE further stated that an agency is required to provide notice of a proposed change to the union prior to implementation even for changes involving the exercise of management rights.¹⁶ According to NAGE, MPD's offer to schedule bargaining did not satisfy its obligation because MPD was aware that NAGE was awaiting necessary I&E information. MPD was obligated to provide the requested relevant information prior to the RIF and it is a ULP for MPD to fail to produce the requested information. NAGE concluded that the appropriate remedy is a return to the status quo ante.¹⁷

MPD countered that it attempted to engage in I&E bargaining and did not violate the CMPA because PERB has held that RIFs are a management right under D.C. Official Code § 1-617.08.¹⁸ MPD cited the emails and phone calls made to NAGE attempting to schedule a bargaining session as establishing its willingness to bargain. MPD states that NAGE's FOIA request does not excuse its failure to follow through on the request to bargain.

The Hearing Examiner found that MPD did not violate D.C. Official Code § 1-617.04(a)(1), (2), (3), (4) and (5). According to the Hearing Examiner, the facts did not establish that MPD failed or refused to engage in I&E bargaining with NAGE but that MPD made multiple responses to NAGE's single demand to bargain and NAGE did not respond. The Hearing Examiner specifically stated that NAGE's arguments overlooked the Abolishment Act, D.C. Code § 1-624.08, which governs RIFs. The Hearing Examiner concluded that the Abolishment Act establishes a mandatory procedural timeline for the implementation of a RIF which is nonnegotiable and cannot be delayed based on the rights described in the CMPA.¹⁹ The Hearing Examiner also found that MPD had a duty to engage in I&E bargaining with NAGE pursuant to the CMPA, but the RIF procedures are nonnegotiable and cannot be delayed based on I&E bargaining or NAGE's FOIA request or the CMPA impasse procedure.²⁰ Furthermore, the Hearing Examiner concluded that the facts and circumstances of NAGE's FOIA request did not constitute material evidence supporting its ULP charge against MPD.²¹

The Hearing Examiner found: (1) MPD did not fail or refuse to engage in I&E bargaining regarding the OCIC RIF; (2) MPD's implementation of the OCIC RIF was consistent with the

¹⁴ *Id.* at 6-7.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.* at 9.

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ *Id.* at 13.

Abolishment Act; (3) MPD was not obligated to delay the OCIC RIF until the completion of I&E bargaining and (4) MPD's response to NAGE'S FOIA request does not form a basis for delay of I&E bargaining or the OCIC RIF. The Hearing Examiner recommended that NAGE'S ULP charge be dismissed with prejudice.²²

IV. Discussion

PERB reviews a Hearing Examiner's Report and Recommendations even if no exceptions are filed, to determine whether the analysis and conclusions are reasonable, supported by the record and consistent with precedent. Issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.²³ Mere disagreements with the Hearing Examiner's findings and/or challenges to the Hearing Examiner's findings with competing evidence do not constitute proper exceptions so long as the record contains evidence supporting the Hearing Examiner's conclusions.²⁴ Exceptions cannot raise issues not presented to the Hearing Examiner.²⁵

According to NAGE the Hearing Examiner's findings are contrary to law because the Abolishment Act does not apply to the RIF at issue in this case. NAGE states that the Abolishment Act only applies to a RIF which is conducted for fiscal reasons, not to any RIF which occurred after 2000.²⁶ NAGE further states that the Hearing Examiner's findings are based on facts not in evidence because there was no testimony, evidence or documentation submitted regarding the Abolishment Act and its applicability to the RIF.²⁷ NAGE also states that the Hearing Examiner's finding that the Agency was unaware of NAGE's FOIA request is based on facts not in evidence.

MPD argues that NAGE's exceptions to the case are merely a recitation of its Post-Hearing Brief and do not state any basis for reversal of the Hearing Examiner's decision.²⁸ MPD also disagrees with the Union's interpretation of the Abolishment Act.²⁹

NAGE's disagreement with the Hearing Examiner's findings is not grounds for overturning the Hearing Examiner's decision. RIFs are a management right under D.C. Official Code § 1-617.08.³⁰ The exercise of a management right does not relieve management of the duty to bargain over the impact and effects of, and procedures concerning, the exercise of management rights decisions. The Abolishment Act, D.C. Official Code § 1-624.08, narrowed

²² *Id.*

²³ *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 62 D.C. Reg. 3544 Op. No. 1506, PERB Case No. 11-U-50(a) (2015).

²⁴ *Sinobia Brinkley v. Fraternal Order of Police/Metropolitan Police Department Labor Committee, District 20, Local 2087*, 60 D.C. Reg. 17387, Op. No. 1446, PERB Case No. 10-U-12 (2013).

²⁵ *Earnest Durant, Jr. v. Government of the District of Columbia, Department of Corrections*, 59 D.C. Reg. 9821, Op. No. 1286, PERB Case No. 07-U-43(a), 08-U-57 (2012).

²⁶ Exception at 3.

²⁷ *Id.* at 5.

²⁸ Opposition at 2.

²⁹ *Id.* at 3.

³⁰ *Doctors' Council of D.C. v. D.C. Dep't of Youth & Rehab. Servs.*, 60 D.C. Reg. 16255, Slip Op. No. 1432 at pg 8, PERB Case No. 11-U-22 (2013).

this duty as it related to a RIF.³¹ The Abolishment Act authorizes agency heads to identify positions for abolishment, establishes the rights of existing employees affected by the abolishment of a position, and establishes procedures for implementing and contesting an abolishment.³² The D.C. Council amended the applicable date to cover the 2000 fiscal year and subsequent fiscal years.³³ The Court of Appeals stated in *Washington Teachers Union, Local 6 v. District of Columbia Public Schools*, that the Abolishment Act should govern the RIF implemented by D.C. Public Schools in 2004, rather than the regular RIF procedures found in D.C. Official Code § 1-624.02.³⁴ The Court stated that § 1-624.08 plainly limited the procedures to which an affected employee is entitled.³⁵ In keeping with *Washington Teachers Union* and PERB precedent, the Hearing Examiner found that the agency is required to engage in I&E bargaining. However, according to the Abolishment Act, the RIF should remain on schedule.

NAGE argues that the Hearing Examiner's finding that the Agency was not aware of NAGE's FOIA request is based on facts not in evidence. This is a disagreement with the Hearing Examiner's determination of the facts. As stated earlier, issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.³⁶ There is no basis for overturning the Hearing Examiner's conclusions and recommendations as they are reasonable, supported by the record and consistent with Board precedent.

V. Conclusion

Pursuant to Board Rule 520.14, the Board finds the Hearing Examiner's conclusions and recommendations to be reasonable, supported by the record and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's Report, and the Complaint is dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

- 1. The National Association of Government Employees, Local R3-05's Unfair Labor Practice Complaint is dismissed.**
- 2. Pursuant to Board Rule 559. 1, this Decision and Order is final upon issuance.**

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

³¹ *Id.*; See also *AFGE, Local 631, AFL-CIO v. District of Columbia, et al*, 62 D.C. Reg. 12582, Op. No. 1530, PERB Case No. 09-U-57(a) (2015);

³² D.C. Official Code § 1-624.08(a)-(i), (k).

³³ *Washington Teachers' Union, Local No. 6 v. District of Columbia Public Schools*, 960 A.2d, 1123, 1126 (D.C. 2008).

³⁴ *Id.*, at 1132.

³⁵ *Id.*

³⁶ *FOP v. MPD*, 62 D.C. Reg. 3544 Op. No. 1506, PERB Case No. 11-U-50(a) (2015).

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By unanimous vote of Board Chairperson Charles Murphy, and Members Ann Hoffman, and Douglas Warshof. Members Barbara Somson and Yvonne Dixon were not present.

December 15, 2016

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-54, Op. No. 1605 was sent by File and ServeXpress to the following parties on this the 29th day of December, 2016.

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