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

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 631,)	
)	PERB Case No. 13-U-23
Complainant,)	
)	Opinion No. 1401
v.)	
)	
District of Columbia)	
Department of General Services,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 631 (“Union” or “Complainant”) filed the above-captioned Unfair Labor Practice Complaint and Request for Preliminary Relief (“Complaint”), against Respondent District of Columbia Department of General Services (“Agency” or “Respondent”) for alleged violations of section 1-617.04(a)(5) of the Comprehensive Merit Protection Act (“CMPA”). Respondent filed a document styled Answer to Unfair Labor Practice Complaint (“Answer”) in which it denies the alleged violations and raises the following affirmative defenses:

- (1) The decision to conduct drug and alcohol testing is a management right pursuant to D.C. Code § 1-617.08, and is therefore not subject to bargaining.
- (2) Complainant failed to establish that Respondent refused to bargain.
- (3) The Complaint is untimely.

(Answer at 5-7).

II. Discussion

A. Background

The facts of this case are largely undisputed. Article 4, Section D of the parties' collective bargaining agreement ("CBA") states: "No Employer regulation or policy that is a negotiable issue is to be adopted or changed without first bargaining with the Union." (Complaint at 2; Answer at 2). Article 43 states, in part: "Employees who hold a CDL license, as required by their positions, shall be tested for drug and alcohol in accordance with the U.S. Department of Transportation regulations." (Complaint at 2; Answer at 2). On May 4, 2012, the Agency provided the Union with a document entitled "Notice of Drug and Alcohol Testing for Safety Sensitive Positions." (Complaint at 2, Complaint Ex. 4A; Answer at 3, Answer Ex. 2).

On December 19, 2012, the Union met with the Agency to present a proposal for the implementation of criminal background checks and drug and alcohol testing. (Complaint at 2; Answer at 3). Via letter dated January 28, 2013, the Agency's representative responded to the Union's proposals, stating in part that "this area of the law is so well covered by law that any attempt to negotiate over it, as demonstrated above, would run afoul of some provision of law. I propose that the parties just follow the law." (Complaint at 2, Complaint Ex. 6; Answer at 3). The Union responded via e-mail on January 30, 2013, stating that its bargaining unit members were not in "safety-sensitive positions." (Complaint at 3, Complaint Ex. 7; Answer at 3). On February 20, 2013, the Union contacted the Agency's representative to request a response to the January 30, 2013 e-mail. (Complaint at 3; Answer at 3). On February 25, 2013, the Union's counsel e-mailed the Agency's representative, stating:

I wrote you about this last week. I have not heard from you and it appears you have not informed the Agency about AFGE 631's bargaining position and rights. What is the District's position on this subject. We have gave [sic] you a proposal, on December 19, 2012, and have only received a letter from you, but no counterproposal. Please respond by February 28, 2013 at 5:00 p.m. as to the District's current position.

(Complaint at 3, Complaint Ex. 9; Answer at 3). On March 5, 2013, the Agency notified the Union that it would begin background checks and drug and alcohol testing for Union bargaining unit employees. (Complaint at 3; Answer at 4). The parties agree that the Union's bargaining unit members are employed in Carpenter, Electrical Worker, Electrician, Maintenance Mechanic Helper, Plumber, and Locksmith Worker positions with the Agency. (Complaint at 3; Answer at 4). The parties dispute whether bargaining unit employees are assigned to positions which meet the criteria for safety-sensitive positions, as provided in D.C. Code § 1-620.31(10). (Complaint at 3; Answer at 4).¹

¹ D.C. Code § 1-620.31(10) states that "safety-sensitive position" means: (A) Employment in which the District employee has direct contact with children or youth; (B) Is entrusted with the direct care and custody of children or youth; and (C) Whose performance of his or her duties in the normal course of employment may affect the health, welfare, or safety of children or youth.

B. Union's position

The Union alleges that the Agency violated D.C. Code § 1-617.04(a)(5) by implementing criminal background checks and drug and alcohol testing for employees who are not in safety-sensitive positions. (Complaint at 4). The Union seeks a preliminary relief order requiring the Agency to cease and desist further criminal background checks and drug and alcohol testing for bargaining unit employees until the Agency bargains with the Union over the implementation of the policy, and “post a notice for six (6) months in all Local 631 bargaining units notifying employees it [?] has violated the law by implementing criminal background checks and drug and alcohol testing without bargaining with Local 631.” (Complaint at 4). Further, the Union asks the Board to issue an order:

- (1) requiring the Agency to cease and desist the criminal background tests and drug and alcohol tests;
- (2) requiring the Agency to reinstate any employees adversely affected by the testing program, expunge and destroy any documents from the employee records concerning the results of those tests, and award back pay, restored annual leave, and costs “associated with any bargaining unit employee’s efforts to resolve any issues arising from the criminal background checks and drug and alcohol testing; and
- (3) requiring a six (6) month notice posting.

(Complaint at 4-5).

C. Agency's position

The Agency raised three affirmative defenses in its Answer. The first is that it has not violated the CBA because it is only required to bargain over negotiable issues², and the decision to conduct drug and alcohol testing is a management right pursuant to D.C. Code § 1-617.08, and therefore not subject to bargaining. (Answer at 5-6, citing *D.C. Fire and Emergency Medical Services Dep't v. AFGC Local 3721*, 54 D.C. Reg. 3167, Slip Op. No. 874 at p. 17, PERB Case No. 06-N-01 (2007)). The Agency states that because Article 4, Section D of the parties’ CBA is inapplicable to non-negotiable issues, it has not violated the CBA. (Answer at 6).

Next, the Agency contends that the Union has failed to establish that the Agency refused to bargain, and that the Union failed to provide significant support for its allegation. (Answer at 6). The Agency states that the Union has offered “only a single action by the Respondent – the Respondent’s January 28, 2013 e-mail and letter – in support of the allegation that Respondent refused to bargain with Complainant.” *Id.*; Answer Ex. 4. In support of this affirmative defense, the Agency cites to *AFGE Local 2741 v. D.C. Dep't of Recreation and Parks* for the proposition

² Article 4, Section D of the parties’ CBA states: “No Employer regulation or policy that is a negotiable issue is to be adopted or changed without first bargaining with the Union.” (Answer Ex. 3).

that a “refusal to bargain in good faith is established by the totality of a party’s actions, and usually a single action standing alone will not demonstrate bargaining in bad faith.” (Answer at 6, citing *AFGE Local 2741 v. D.C. Dep’t of Recreation and Parks*, 46 D.C. Reg. 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999)).

Finally, the Agency alleges that the Complaint is untimely pursuant to Board Rule 520.4, which requires unfair labor practice complaints to be filed not later than 120 days after the date on which the alleged violations occurred. (Answer at 6). The Agency states that it notified the Union that bargaining members would be subject to criminal background checks, traffic records checks, and drug and alcohol testing on May 4, 2012. (Answer at 7, Answer Ex. 2). From that date, the Agency asserts that the Complaint was due by September 3, 2012, but was not filed until April 3, 2013. *Id.*

D. Analysis

As a threshold issue, we must address the Agency’s allegation that the Board lacks jurisdiction to consider this matter because the Complaint is untimely. Board Rule 520.4 states that unfair labor practice complaints must be filed “not later than 120 days after the date on which the alleged violations occurred.” The Board does not have jurisdiction to consider unfair labor practice complaint filed outside of the 120-day window. *See, e.g., Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) (“[T]ime limits for filing appeals with administrative adjudicative agencies...are mandatory and jurisdictional.”). The 120-day time period for filing a complaint begins when the complainant knew or should have known of the acts giving rise to the violation. *Pitt v. D.C. Dep’t of Corrections*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009).

In the instant case, the alleged violations are the Agency’s “refusal to bargain and repudiation of Local 631’s CBA,” in contravention of D.C. Code § 1-617.04(a)(5). (Complaint at 3-4). The Agency notified the Union of the drug and alcohol testing policy on May 4, 2012. (Complaint at 2; Answer at 3). However, the Agency did not notify the Union that its bargaining proposals were rejected until January 28, 2013. (Complaint at 2, Complaint Ex. 6; Answer at 3). January 28, 2013, was the earliest possible date that the Union could have become aware of the alleged violation. The Complaint was filed 64 days after January 28, 2013, and thus is not untimely. *See Durant v. D.C. Dep’t of Corrections*, Slip Op. No. 1288 at p. 4-5, PERB Case Nos. 10-U-39 and 10-E-07 (June 27, 2012); *Hill v. Nat’l Union of Hospital and Healthcare Employees, Local 2095*, Slip Op. No. 1322 at p. 2, PERB Case No. 08-U-74 (March 27, 2012); *Morton v. Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee*, 59 D.C. Reg. 7366, Slip Op. No. 1268 at p. 2, PERB Case No. 10-U-43 (2012). Therefore, the Agency’s allegation that the Complaint is untimely is dismissed.

To determine whether Respondent was required by the parties’ CBA to bargain with the Union over the implementation of criminal background checks, traffic record checks, and drug and alcohol testing, the Board must consider whether the decision to implement these checks is a management right, pursuant to D.C. Code § 1-617.08. In the context of drug testing, the Board has previously held that an agency’s decision to implement a drug testing policy is “plainly a

management decision.” *Teamsters Local 639 v. D.C. Public Schools*, 38 D.C. Reg. 96, Slip Op. No. 249 at p. 3, PERB Case No. 89-U-17 (1990); *see also Teamsters Local Union 639 v. D.C. Public Schools*, 38 D.C. Reg. 3313, Slip Op. No. 274 at pgs. 1-2, PERB Case Nos. 90-N-02, 90-N-03, and 90-N-04 (1991) (the standard for imposition of drug testing is nonnegotiable because it is closely related to the right to implement a drug testing program); *Fraternal Order of Police/Metropolitan Police Dep’t Labor Committee v. Metropolitan Police Dep’t*, 59 D.C. Reg. 9742, Slip Op. No. 1026 at p. 8, PERB Case No. 07-U-24 (2010). Therefore, the implementation of the criminal background checks, traffic record checks, and drug and alcohol testing is a non-negotiable management right, and the Agency did not repudiate the parties’ CBA by violating Article 4 or failing to bargain in good faith.

The Board has consistently held that an exercise of management rights does not relieve the employer of its obligation to bargain over the impact and effects of, and procedures concerning, the implementation of management rights. *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 41 D.C. Reg. 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994); *see also D.C. Nurses Association v. D.C. Dep’t of Mental Health*, 59 D.C. Reg. 9763, Slip Op. No. 1259, PERB Case No. 12-U-14 (2012), *American Federation of Government Employees, Local 383 v. D.C. Dep’t of Disability Services*, 59 D.C. Reg. 10771, Slip Op. No. 1284, PERB Case No. 09-U-56 (2012). Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain. *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 29 D.C. Reg. 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). The Board has held that “[a]ny general request to bargain over a matter implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable.” *International Brotherhood of Police Officers, Local 446 v. D.C. General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). An unfair labor practice has not been committed until there has been a general request to bargain and a “blanket” refusal to bargain. *AFSCME District Council 20, Local 2921 v. D.C. Public Schools*, 60 D.C. Reg. 2602, Slip Op. No. 1363 at p. 5, PERB Case No. 10-U-49 (2013) (*citing Fraternal Order of Police/Dep’t of Corrections Labor Committee v. D.C. Dep’t of Corrections*, 49 D.C. Reg. 8937, Slip Op. No. 679 at p. 9, PERB Case Nos. 00-U-36 and 00-U-40 (2002)).

Although the Agency was not required to bargain over the decision to implement the background check and drug and alcohol testing program, the question remains whether the Union made a request to bargain over the impact and effects of the program, and if so, whether the Agency refused to engage in impact and effects bargaining. Where there “exists a duty to bargain over the impact and effects of a decision involving the exercise of a managerial prerogative... categorically refusing to bargain over this aspect is done so at the risk of management.” *Teamsters Locals 639 and 730 v. D.C. Public Schools*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). In the instant case, there are no allegations that the Union specifically requested impact and effects bargaining, but the December 19, 2012, meeting and the proposal submitted at that meeting fall under *International Brotherhood of Police Officers, Local 446’s* broad definition of a request to bargain. Slip Op. No. 322 at p. 3. It is undisputed that the Agency met with the Union on December 19, 2012, and that the Union presented a proposal for the background check and drug and alcohol testing program.

(Complaint at 2, Complaint Ex. 5; Answer at 3). It is also undisputed that the Agency responded to the Union's proposals via the January 28, 2013, e-mail. (Complaint at 2, Complaint Ex. 6; Answer at 3, Answer Ex. 4). A review of the January 28, 2013, e-mail shows that the Agency's representative addressed, point by point, the Union's proposal for the background checks and drug and alcohol testing program, before rejecting the proposal. (Complaint Ex. 6; Answer Ex. 4). The Agency's response cannot be characterized as a blanket or categorical refusal to bargain, and therefore the Agency did not violate D.C. Code § 1-617.04(a)(5) by failing to bargain in good faith. *See AFSCME District Council 20, Local 2921, Slip Op. No. 1363 at p. 5; see also Fraternal Order of Police/Dep't of Corrections Labor Committee v. D.C. Dep't of Corrections, Slip Op. No. 679 at p. 9.* The Union's Unfair Labor Practice Complaint is dismissed.³

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant Fraternal Order of Police/Metropolitan Police Dep't Labor Committee'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
Washington, D.C.

July 29, 2013

³ As the Board has dismissed the Union's Unfair Labor Practice Complaint, the Union's Request for Preliminary Relief is moot and will not be addressed.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-23 was transmitted via File & ServeXpress to the following parties on this the 29th day of July, 2013.

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