Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Locals 631, 383, 1000, 1403, 1975, 2725, 2741, 2978, 3444, and 3721,	
Complainants,	
v.	PERB Case No. 09-U-31
District of Columbia Government, Office of Labor Relations and Collective Bargaining, Department of Public Works, Office of Property Management, Office of Zoning, Office of Planning, Department of the Environment, Department of Transportation, Department of Motor Vehicles, Taxi Cab Commission, Department of Parks and Recreation, Department of Employment Services, Department of Health, Department of Fire and Medical Services, Department of Consumer and Regulatory Affairs, Department of Housing and Community Development, Department of Youth Rehabilitation Services, Department of Mental Health, Department of Human Services, Martin Luther King Library, Department of Attorney General, Metropolitan Police Department (Police Garage Division), Office of the State Superintendent of Education,	Opinion No. 1541 **Motion for Reconsideration**
Respondents.	

DECISION AND ORDER

Before the Board is a motion for reconsideration filed by the Respondents, the District of Columbia Government and twenty one of its agencies[1] ("Agencies" or "Respondents"). In

[1] Office of Labor Relations and Collective Bargaining, Department of Public Works, Office of Property Management, Office of Zoning, Office of Planning, Department of the Environment, Department of Transportation, Department of Motor Vehicles, Taxi Cab Commission, Department of Parks and Recreation, Department of Employment Services, Department of Health, Department of Fire and Medical Services, Department of Consumer and Regulatory Affairs, Department of Housing and Community Development, Department of Youth Rehabilitation Services, Department of Mental Health, Department of Human Services, Martin Luther King Library, Department of

Opinion No. 1528,[2] the Board found that the Agencies had committed an unfair labor practice against ten locals of the American Federation of Government Employees[3] ("Unions" or "Complainants") and ordered the Agencies to bargain with the Unions and to post a notice of the violation.

The Respondents timely moved for reconsideration of the decision and order, requesting that the Board either reconsider its decision and order or provide clarification regarding the order and the notice issued by the Board. The motion for reconsideration is denied for the reasons set forth below, which provide further discussion of the issues raised in the motion as requested by Respondents.

I. Statement of the Case

The Unions' complaint alleged that the Agencies refused to bargain over the development of a new annual electronic performance management system known as the ePerformance system and a drug and alcohol testing program. The Unions further alleged that the Agencies failed to provide requested information regarding those two programs ("the Programs").

The matter was referred to a Hearing Examiner. Following a hearing and the filing of post-hearing briefs by the parties, the Hearing Examiner issued a Report and Recommendation. The Hearing Examiner determined that the Programs fall within management rights as defined in the CMPA[4] and thus the Respondents were not required to bargain over the decisions to implement the Programs.[5] Because the Programs impacted the terms and conditions of employment, the Agencies were required to bargain over the impact and effects of the Programs once the Unions requested that they do so.[6] The Hearing Examiner concluded that the Unions proved the Agencies committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a) (5) "by refusing to engage in impact and effect[s] bargaining regarding the drug and alcohol testing policy and regarding ePerformance and its implementation."[7]

The Agencies filed exceptions in which they objected that the Report and Recommendation ignored the basis for their position that they were under no duty to bargain over the impact and effects of the ePerformance system, i.e., their contention that section 1-613.53(b) of the D.C. Official Code prohibits impact-and-effects bargaining related to the ePerformance system. Section 1-613.53(b) provides, "Notwithstanding any other provision of

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Attorney General, Metropolitan Police Department (Police Garage Division), Office of the State Superintendent of Education

[2] *AFGE Local 631 v. D.C. Gov't*, 62 D.C. Reg. 11793, Slip Op. No. 1528, PERB Case No. 09-U-31 (2015) ("Opinion No. 1528").

[3] Locals 631, 383, 1000, 1403, 1975, 2725, 2741, 2978, 3444, and 3721.

[4] D.C. Official Code § 1-617.08(a).

[5] Report & Recommendation 11.

[6] *Id.* at 11-12 (citing *Teamsters Local Unions No. 639 & 730 v. D.C. Pub. Sch.*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991)).

[7] Report & Recommendation 12.

law or of any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a non-negotiable subject for collective bargaining."

The Unions filed an opposition to the exceptions. The Unions noted that section 1-613.53(b) is entitled "Transition provisions" and renders nonnegotiable "the implementation of the performance management system established in this subchapter," i.e., subchapter XIII-A of chapter VI of title 1 of the D.C. Official Code. The Unions argued that the ePerformance system is not the performance management system established in that subchapter.

The Board determined that it was unnecessary to address the Unions' argument that section 1-613.53(b) is inapplicable to the implementation of the ePerformance system. The reason the Board found it unnecessary to address that argument is that the present case is only about impact-and-effects bargaining. The Board stated that impacts and effects are not the same as implementation,[8] contrary to the Agencies' argument, and further the Board noted that it had previously held that section 1-613.53(b) is not a bar to impact-and-effects bargaining.[9]

The Board accepted the Hearing Examiner's recommended finding that the Agencies had committed an unfair labor practice by refusing to engage in impact-and-effects bargaining regarding the Programs.

The Board issued the following orders:

1. The Agencies shall cease and desist from refusing to bargain, upon request, about the procedures for and the impact and effects of the ePerformance system and the drug and alcohol testing program.

2. The Agencies shall negotiate in good faith with the Unions, upon request, with respect to procedures for and the impact and effects of the ePerformance system and the drug and alcohol testing program.

3. Each of the Agencies shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The notice shall remain posted for thirty (30) consecutive days.

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[8] Opinion No. 1528 at 12 (citing *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 59 D.C. Reg. 9742, Slip Op. No. 1026 at 12, PERB Case No. 07-U-24 (2010)).

[9] Opinion No. 1528 at 12 (citing *AFGE Local 631 v. D.C. Gov't*, 59 D.C. Reg. 15175, Slip Op. 1334 at pp. 2-3, PERB Case No. 09-U-18 (2012), and *AFSCME, Dist. Council 20 v. D.C. Pub. Sch.*, 60 D.C. Reg. 2602, Slip Op. No. 1363 at p. 6, PERB Case No. 10-U-49 (2013) (finding impact-and-effects bargaining required notwithstanding the nonnegotiability of the evaluation process and the instruments for evaluating D.C. Public Schools employees)) .

The notice the Board furnished to the Agencies for posting states:

> **WE HEREBY NOTIFY** our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.
>
> **WE SHALL** cease and desist from refusing to bargain in good faith with the exclusive representative of our employees over the procedures for and the impact and effects of the ePerformance system and the drug and alcohol testing program.
>
> **WE SHALL** cease and desist from violating D.C. Official Code § 1-617.04(a) (1) and (5) by the actions and conduct set forth in Slip Opinion No. 1528.

The Agencies filed a motion for reconsideration and an amended motion for reconsideration. As amended, the motion argues that the Board's decision distinguishes implementation from impact and effects but its order and notice impose a duty to bargain over procedures as well as impact and effects. "Given its analysis in the Decision," the Agencies argue, "the language of both the Order and the Notice digress from the Board's distinction between the 'implementation' of a policy, and the 'impact and effects' of such an implementation."[10] The Agencies contend that the order and the notice should be corrected with regard to the ePerformance system. "The reference to 'procedures' which constitute the implementation of the system, should be deleted."[11]

The Agencies further object that the order requires the same type of bargaining for the ePerformance system as it does for drug and alcohol testing. The Agencies contend that the two require separate treatment because section 1-613.53(b) does not apply to drug and alcohol testing. The Agencies claim that they did not contest the duty to bargain over the implementation or the impact and effects of the drug and alcohol testing program. The Agencies assert that the order and notice should be corrected to reflect the different duties to bargain, but the Agencies do not say what the correction should be.

Alternatively, the Agencies request the Board to provide clarification for the notice and order. They also request "that the date the prior Decision & Order herein becomes final be reset to reflect the date of the Decision & Order arising from the instant filing and any Union response."[12]

The Unions filed an Opposition to the amended motion for reconsideration. In their Opposition, the Unions observe that the Agencies cited no authority in support of their motion.

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[10] Am. Mot. for Recons. 2.
[11] Am. Mot. for Recons. 3.
[12] Am. Mot. for Recons. 3.

The Unions state that in contrast "[l]ong-standing PERB precedent makes clear that an agency's obligation to bargain over 'impact and effects' encompasses the obligation to bargain 'with the exclusive representative of its employees over the impact or effect of, and procedures concerning, the implementation of . . . management rights decisions.'"[13] The parties' post-hearing briefs reflect their understanding of this principle.[14] The Unions state that the claim made by the Respondents that they did not contest the duty to bargain over the implementation and impact and effects of the drug and alcohol testing program is contrary to the record.[15]

II. Discussion

The Respondents have requested that the Board reset the date the decision and order becomes final to the date of the decision and order that arises from their motion for reconsideration. Where a motion for reconsideration is filed, the date the decision and order becomes final is reset by operation of Board Rules 559.2 and 559.3[16]

Regarding the merits, the wording of the order and the notice was neither a digression nor an error in need of correction. Opinion No. 1528 noted that the starting point of the Unions' post-hearing brief was "that management must bargain over the impact and effects of, and procedures concerning, a management rights decision."[17] The Board has repeatedly reaffirmed that duty. For example, the Board held that an agency's "refusal to bargain over the procedures and the effects and impact of its drug-testing program constituted an unfair labor practice."[18] As the Unions put it in their Opposition, "'procedures concerning' is part and parcel of 'impact and effects.'"[19] In its decisions affirming the duty to bargain upon request over the impact and effects of, and procedures concerning, the implementation of management rights, the Board also often refers elliptically to simply "impact and effects" or "impact and effect bargaining," sometimes in the same paragraph with the longer phrase.[20]

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[13] Opp'n to Am. Mot. for Recons. 5 (quoting *AFGE Locals 631, 255, & 872 v. D.C. Water & Sewer Auth.*, 51 DC Reg. 3537, Slip Op. No. 721 at p. 4, PERB Case No. 03-U-34 (2003)).

[14] Opp'n to Am. Mot. for Recons. 4 (citing Post-Hearing Br. of Complainant 6 and Post-Hearing Br. of Resp't 8).

[15] Opp'n to Am. Mot. for Recons. 3.

[16] Rule 559.2 The Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision, or if the Board reopens the case on its own motion within ten (10) days after issuance of the decision, unless the order specifies otherwise.

Rule 559.3 Upon the issuance of an Opinion on any motion for reconsideration of a Decision and Order, the Board's Decision and Order shall become final.

[17] Opinion No. 1528 at p. 3. The Unions consistently used that terminology in their post-hearing brief. Post-Hearing Br. of Complainant 2, 6, 8, 12, 13-14.

[18] *Teamsters Local No. 639 and D.C. Pub. Sch.*, 38 D.C. Reg. 5069, Slip Op. No. 279 at p. 3, PERB Case No. 90-A-09 (1991).

[19] Opp'n to Am. Mot. for Recons. 5.

[20] *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 62 D.C. Reg. 3544, Slip Op. No. 1506 at p. 8 n.41, PERB Case No. 11-U-50 (2014); *NAGE, Local R3-08 v. D.C. Homeland Security & Emergency Mgmt. Agency*, Slip Op. No.1468 at pp. 3-4, PERB Case No. 14-N-02 (May 13, 2004); *Washington Teachers' Union Local #6 v. D.C. Pub. Sch.*, 61 D.C. Reg. 1537, Slip Op. No. 1448 at pp. 2-4, PERB Case No. 04-U-25 (2014); *AFGE, AFL-CIO, Local 2978 v. D.C. Dep't of Health*, 59 DC Reg. 9783, Slip Op. No. 1267 at p. 2, PERB Case No. 11-U-

All of those phrases simply extract the key words from the Board's explanation of the principle in its initial opinion on the subject.

> A distinction must be made, however, between the authority, on the one hand, to decide how many employees are needed, and the determination, on the other, of how the *effects* or *impact* of this decision are to be handled. The District of Columbia Board of Labor Relations (BLR) recognized this distinction in Federal City College Faculty Association and Federal City College, BLR Case No. TU001, Opinion No. 15 (April 12, 1977), involving the predecessor parties to the relationship involved in the present case. The holding there was that "the practical *impact* of the decision [to reduce force]... is negotiable but not the decision itself." The Opinion stated further that "[a]lso included within the scope of bargaining are the *procedures* for implementing the decision." More recently the California Public Employee Relations Board has held in Merced Community College District, 3NPER 11197 (CA., 11/17/80) that the "[c]ollege's decision to layoff employees was a managerial prerogative, but the college's refusal to bargain concerning the *effects* of the layoffs was unlawful."[21]

The Board's use of an abbreviated phrase to refer to the above principle does not imply that procedures concerning management rights are nonnegotiable. An agency has a duty to bargain "upon request, over the impact and effects, which include the procedures for implementing a management right."[22] Procedures concerning an exercise of a management right are as appropriate a subject of bargaining as the impact and effects of the exercise of a management right. The Kansas Public Employee Relations Board explained that "as a general rule procedural matters pose no significant threat of interference with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy."[23]

The only exception is reductions in force. While procedures for implementing a reduction in force as well as its impact and effects formerly were negotiable, the Omnibus Personnel

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33(2012) ("'[A]n exercise of management rights does not relieve the employer of its obligation to bargain over impact and effect of, and procedures concerning, the implementation of [that right].' Unions enjoy the right to impact and effects bargaining concerning a management rights decision only if they make a timely request to bargain.") (internal citation omitted); *F.O.P./Metro. Police Dep't Labor Comm. v. Metro. Police Dep't*, 59 D.C. Reg. 9742, Slip Op. No. 1026 at 12, PERB Case No. 07-U-24 (2010); *Int'l Bhd. of Police Officers v. D.C. Gen. Hosp.*, 41 D.C. Reg. 2321, Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (1992).

[21] *Univ. of D.C. Faculty Ass'n/NEA and Univ. of D.C.*, 29 D.C. Reg. 2975, Slip Op. No. 43 at p. 4, PERB Case No. 82-N-01 (1982) (emphasis added).

[22] 45 D.C. Reg. 4771, Slip Op. No. 517 at p. 2, PERB Case No. 97-U-12 (1997).

[23] *Kan. Ass'n of Pub. Employees v. Kan. Adjutant General's Office*, No. 75-CAE-9-1990, 1991 WL 11694350, at *20 (Mar. 11, 1991).

Reform Act of 1997, known as the Abolishment Act, makes the procedures that it establishes for reductions in force nonnegotiable.[24]

The Agencies argue that because the Board distinguished between implementation, on the one hand, and impact and effects, on the other, the Board's order should be confined to impact and effects. In support of that distinction, the Board cited in Opinion No. 1528 *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, which states:

> The Board has consistently held that "management's rights under [D.C. Code § 1-617.08] do not relieve [management] of its obligation to bargain . . . over the impact or effects of, and procedures concerning the implementation of . . . management right decisions." *American Federation of Government Employees, Local 383 v. D. C. Department of Human Services*, 49 DCR 770, Slip Op. No. 418 at p. 4, PERB Case No. 94-U-09 (2002). However, the effects and impact of a non-bargainable management right decision upon terms and conditions of employment, are bargainable only upon request. Moreover, an Employer does not bargain in bad faith by merely unilaterally implementing a management right. The violation arises from the failure to provide an opportunity to bargain over the impact and effects once a request is made.[25]

In that paragraph the Board reiterated its consistent holding on the duty to bargain over the impact or effects of, and procedures concerning, the implementation of management rights decisions. The Board also stated that unilaterally implementing a management right, however, is permitted, implying that implementation is distinct from the procedures concerning implementation as well as from its impact and effects.

There is no reason for the order or the notice to treat the Agencies' bargaining duties with respect to the ePerformance system differently from its bargaining duties with respect to drug and alcohol testing. They both involve management rights that do not relieve management of its obligation to bargain over the impact and effects of, and procedures concerning, the implementation of management rights decisions. Contrary to the Agencies' unfounded claim, the Agencies refused to bargain over those matters with respect to both Programs and not just the ePerformance system.[26] They continued to contest their duty to bargain over the drug and alcohol

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[24] *NAGE, Local R3-07 v. D.C. Office of Unified Commc'ns*, 61 D.C. Reg. 7353, Slip Op. No.1467 at p. 5-6, PERB Case No. 14-N-01 (2014).
[25] 59 D.C. Reg. 9742, Slip Op. No. 1026 at p. 12, PERB Case No. 07-U-24 (2010).
[26] Report & Recommendation 6.

testing program as well as the ePerformance system in the proceedings before the Board.[27] Consequently, the Board has ordered the Agencies to bargain over the procedures for and the impact and effects of the Programs. It has not ordered the Agencies to bargain over the implementation of the ePerformance system. The negotiability of a particular proposal regarding the ePerformance system that is alleged to concern the implementation of the ePerformance system and to be covered by section 1-613.53(b) can be determined in a negotiability appeal.

In view of the above, we find no basis for reversing or modify, in whole or in part, our Decision and Order in Opinion No. 1528. Therefore, the order and notice remain as issued.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Respondents' Motion for Reconsideration is denied.

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.

By unanimous vote of Board Chairman Charles Murphy and Members Keith Washington, Ann Hoffman, and Yvonne Dixon

September 22, 2015

[27] The Agencies' answer raised the affirmative defense that the ePerformance system and the drug and alcohol testing program are impermissible subjects of bargaining. Answer 6 (ePerformance), 7 (drug and alcohol testing).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served upon the following parties by File and ServeXpress on this the 22d day of September 2015.

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