GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
International Brotherhood of Police Officers, Local 446, AFL-CIO,	)	
Complainant,	)	PERB Case No. 91-U-06
	)	Opinion No. 312
v.	)	
District of Columbia General Hospital,	)	
Respondent.	)	

DECISION AND ORDER

On February 12, 1991, the International Brotherhood of Police Officers, Local 446 (IBPO) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board) charging that the Respondent District of Columbia General Hospital (DCGH) had violated D.C. Code Sec. 1-618.4(a)(1)(2)(3) and (5) of the Comprehensive Merit Personnel Act (CMPA). IBPO alleged that DCGH unilaterally implemented a new night shift security post, thereby effecting a significant change in working conditions of bargaining unit employees and thereafter refusing to bargain with IBPO, the exclusive representative of the affected employees. On March 6, 1991, DCGH filed an Answer to the Complaint denying the commission of any unfair labor practice. By notice issued on August 15, 1991, the Board ordered a hearing which, in accordance with the notice, was held on September 17, 1991, before a duly designated hearing examiner. [1]/

The Hearing Examiner, in a Report and Recommendation (R&R) issued on December 14, 1991, found that "the implementation of the decision to add Post 12...had a significant impact on employee working conditions and that it would normally follow that the Respondent was obligated to bargain upon request over the effects of these changes." (R&R at 3 and 4.) However, he concluded that Article 5, Section F of the parties' collective

---

[1]/ At the hearing, IBPO withdrew the Complaint allegations that, by the acts and conduct noted above, DCGH violated D.C. Code Sec. 1-618.4(a)(2) and (3) of the CMPA.

bargaining agreement [2]/ constituted a "clear and unmistakable waiver" [3]/ of IBPO's "right to bargain over such changes or the effects [4]/ of such changes...." (R&R at 6.) He therefore concluded that DCGH did not violate D.C. Code Sec. 1-618.4(a)(1) and (5) "by refusing to bargain with [IBPO] over the effects that the establishment of Post 12 had upon employee working conditions." (R&R at 6-7.) [5]/

On January 15, 1992, IBPO filed exceptions to the Hearing Examiner's Report and Recommendations. [6]/ DCGH filed a Response to the Exceptions. IBPO excepted, generally, to the Hearing Examiner's finding and conclusion that there was a "clear and unmistakable waiver" of its right to bargain over the effects of DCGH's establishment of a new security post.

The Board, after reviewing the entire record and applicable authority, finds merit in IBPO's exception to the Hearing Examiner's finding and conclusion. For the reasons we address

---

[2]/ The Hearing Examiner found that although the parties' collective bargaining agreement expired by its terms on September 30, 1990, "the parties ha[d] agreed to continue to give full force and effect to this agreement after its expiration date." (R&R at 12.)

[3]/ This standard for effecting a waiver of a statutory right was embraced by the U.S. Supreme Court in Metropolitan Edison v. National Labor Relations Board, 460 U.S. 693 (1983), and has been relied upon often by this Board regarding a union's statutory right to bargain under the CMPA. See, e.g., PERB Case Nos. 89-U-17 and 90-U-28, infra.

[4]/ It was determined at hearing that IBPO sought to bargain only "the impact th[e] change would have on employee working conditions" and not "over the decision to establish Post 12." (emphasis added) (R&R at 2 and n.1.)

[5]/ An account of the relevant background of this case is contained in the Hearing Examiner's Report and Recommendation, a copy of which is attached hereto.

[6]/ In its Exceptions, IBPO requested that it be allowed "the opportunity to present the exceptions at an oral argument ...." Board Rule 520.13 allows for such requests to be made along with the reasons for the request. IBPO has neither provided, however, nor do we perceive any reason for oral argument given the record before us. Therefore, in view of the adequate opportunity we believe has been afforded the parties, we deny IBPO's request for oral argument.

below, we reject the Hearing Examiner's conclusion that there was a "clear and unmistakable waiver" of IBPO's right to bargain over the impact or effects of DCGH's establishment of Post 12.

In his Report and Recommendation, the Hearing Examiner determined that Article 3, Section A and Article 5, Section F of the parties' collective bargaining agreement met the "clear and unmistakable" standard required to waive IBPO's statutory right under the CMPA to bargain over the effects or impact of DCGH's establishment of a new security post. Article 3, Section A, entitled "Management Rights" is a restatement of D.C. Code Sec. 1-618.8(a). We have consistently held (since a time predating the parties' collective bargaining agreement) that this statutory provision of the CMPA, notwithstanding its expressed statutory reservation in management of certain listed actions, relieves management only of any obligation to bargain over its decision to take the actions listed thereunder. However, we also held that Sec. 1-618.8(a) does not relieve management of its obligation to bargain with respect the impact or effect and procedures, concerning the exercise of management rights decisions. See Washington Teachers' Union, Local 6, AFL-CIO v. District of Columbia Public Schools, 38 DCR 2654, Slip Op. No. 271, PERB Case No. 90-U-28 (1991), Teamsters Local Union Nos. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990) and American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Clearly, therefore, Article 3, Section A does not act as a waiver of IBPO's statutory right to bargain over the effects or impact of DCGH's decision on bargaining-unit employees, notwithstanding contractual and statutory reservations in management with respect to DCGH's decision to establish a new security post. See D.C. Code Sec. 1-618.8(a)(4) and (5). This contractual reiteration of statutory rights cannot be interpreted as providing any more or less with respect to DCGH's duty to bargain than what we have ruled is afforded under the CMPA.

We turn now to Article 5, Section F which provides:

Article 5
Labor-Management Meetings

* * * *

Section F.

The Employer agrees that it will notify and, upon request, consult with the Union as far in advance

> as is possible prior to the implementation of new (or change of existing) policies, practices, and/or regulations related to bargaining unit working conditions. The Union may submit to Management written comments prior to the prospective date of such implementation or changes. In the event of emergency situations it is understood that no such notification will be required.
>
> Such issues shall be considered appropriate for discussion at Labor-Management meetings.

In reaching his conclusion that the above contractual provision, constituted a "clear and unmistakable waiver" of IBPO's statutory right to bargain over working conditions, the Hearing Examiner made no distinction between IBPO's right to bargain over DCGH's decision to implement new or change existing bargaining-unit working conditions, i.e., the establishment of Post 12, and IBPO's right (and DCGH's obligation) to bargain over the effects or impact of that decision. [7]/ IBPO seeks bargaining only with respect to the latter. As previously noted, under the CMPA, a distinct duty to bargain exists with respect to the effects or impact of management decisions on the terms and conditions of employment of bargaining unit employees. While Article 5, Section F may be "clear and unmistakable" with respect to DCGH's obligations to notify and consult IBPO concerning management decisions to implement new or change existing working conditions, e.g., establishment of Post 12, it is silent with respect to the impact or effects of such decisions. We, therefore, cannot conclude that Article 5, Section F is a "clear and unmistakable waiver" of IBPO's right (and, concomitantly, DCGH's duty) to bargain upon request over the impact or effects of such management decisions. [8]/ Moreover, Article 5 (of which

---

[7]/ The right and attending duty to bargain over the impact or effects of a management-right decision arises from the general right to bargain over employee terms and conditions of employment under the CMPA. D.C. Code Sec. 1-618.2(b)(4). The right to bargain over such effects has long been recognized in the private sector by the National Labor Relations Act (which contains a similar statutory provision on the scope of collective bargaining, i.e., Section 8(d)). See, Transmarine Navigation Corp., 170 NLRB No. 43 (1968).

[8]/ See, e.g., National Labor Relations Board v. Challenge Cook Brothers, 843 F.2d. 230 (6th Cir. 1988), where the U.S. Court of Appeals citing the U.S. Supreme Court decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), found a provision, in the parties' collective bargaining agreement, which

Section F is a part) concerns the structure and breadth of purpose of "Labor-Management Meetings". Any determination of Section F as a waiver of statutory rights under the CMPA must be made within this context. [9]/

We therefore conclude that by unilaterally establishing Post 12 without first bargaining, upon request, with IBPO over the effects or impact on bargaining unit employees' terms and conditions of employment, DCGH has refused to bargain in good faith with IBPO in violation of D.C. Code Sec. 1-618.4(a)(1) and (5). Teamsters Local Union Nos. 639 and 730 a/w Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, supra. Contrary to the Hearing Examiner, our determination regarding this violation does not require Complainant to establish that a duty to bargain existed with respect to specific impact or effect proposals either contemplated or speculated. The violation consists of DCGH's unilateral action, i.e., establishment of Post 12, without bargaining, as requested by IBPO, over the impact and effects of that action and, thereafter, continuing to refuse to bargain. Id.

ORDER

1. The District of Columbia General Hospital (DCGH) shall cease and desist from unilaterally establishing new security posts without providing an opportunity to bargain the impact and effect with the International Brotherhood of Police Officer, Local 446, AFL-CIO (IBPO).

2. DCGH shall cease and desist from interfering, in any like or related manner, with the rights guaranteed employees by the

---

(Footnote 8 Cont'd)
was silent with respect to the duty to bargain over the effects of management rights decisions, did not constitute a clear waiver of the employer's statutory duty with respect to effects bargaining.

[9]/ Unlike Article 3, Section A, Article 5, Section F is not limited to management rights matters as set forth under D.C. Code Sec. 1-618.8(a) of the CMPA. Rather Article 5, Section F addresses changes in "policies, practices and/or regulations related to bargaining unit working conditions" without qualification as to whether such changes are the result of reserved management right decisions. We have no occasion in this Decision and Order to rule upon the effect of Article 5, Section F on IBPO's right to bargain over decisions to implement new or change existing working conditions concerning matters that are not statutorily reserved in management.

Comprehensive Merit Personnel Act, by unilaterally implementing a new security post without notice and an opportunity to bargain with the exclusive representative, IBPO.

3. DCGH shall negotiate in good faith with IBPO, upon request, about the impact and effect on bargaining-unit employees of establishing Post 12.

4. DCGH shall henceforth cease and desist from implementing new security posts before fulfilling its obligation to bargain with IBPO, upon request, the impact and effects of establishing new security posts on bargaining-unit employees' terms and conditions of employment.

5. Representatives of DCGH and IBPO shall meet within seven (7) calendar days of the date of IBPO's request for bargaining as provided under paragraph 3 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 resulting agreement between the parties or ultimate award imposed by interest arbitration concerning the impact and effects of establishing Post 12 shall, at the election of IBPO, take effect retroactively to November 16, 1990, the date Post 12 was implemented.

6. DCGH 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.

7. DCGH shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

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

May 27, 1992

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES REPRESENTED BY THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 446, AFL-CIO AT THE DISTRICT OF COLUMBIA GENERAL HOSPITAL: THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 312, PERB CASE NO. 91-U-06.

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 new security posts without providing an opportunity to bargain to the International Brotherhood of Police Officers, Local 446, AFL-CIO (IBPO) concerning the impact and effects thereof on bargaining-unit employees.

WE WILL bargain collectively in good faith with IBPO over the impact and effects on bargaining resulting from the establishment of a new security post.

WE WILL NOT in any like or related manner interfere with the rights guaranteed to employees by the Comprehensive Merit personnel Act to the bargaining unit employees at the D.C. General Hospital.

District of Columbia
General Hospital

Date:_____ By:_____
(Administrator)

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20006. Phone 727-1822.

ATTACHMENT

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
International Brotherhood of Police Officers Local 446, AFL-CIO	
Complainant	
v.	PERB Case No. 91-U-06
District of Columbia General Hospital	
Respondent	

HEARING EXAMINER'S REPORT AND RECOMMENDATION

This proceeding before the District of Columbia Public Employee Relations Board (PERB) arises out of an unfair labor practice complaint filed by the Complainant/Union on February 12, 1991. The complaint alleges that Respondent/DCGH violated Section 1-618-4(a)(1), (2), (3) and (5) of the District of Columbia Comprehensive Merit Personnel Act (CMPA) and the D.C. Code by its actions in connection with the unilateral implementation of a significant change in employee working conditions. In an answer, duly filed, Respondent/DCGH denies that it has engaged in any unfair labor practices. Thereafter, a hearing was held on September 17, 1991 before Robert J. Perry, Esq., the undersigned Hearing Examiner. At the hearing, the Union was represented by Edward J. Smith, Esq., and the Respondent was represented by LeBaron Frost, its Director of Labor Relations and Stephen Cook, Esq. The parties were given a full opportunity to examine and cross-examine witnesses and to adduce relevant evidence. Both parties waived oral argument and instead filed post hearing briefs. Also, subsequent to the hearing, various motions were filed by the parties. These motions will be discussed, infra.

Background

The Union is the exclusive bargaining representative for all Special Police Officers of the D.C. General Hospital. The most recent collective bargaining agreement between the parties by its terms expired on September 30, 1990, but the parties have agreed

to continue to give full force and effect to this agreement after its expiration date. Prior to the events in question, DCGH maintained 11 security posts throughout the facility. Some of these posts were stationary and others were roving and, since on any given shift only 5 or 6 officers would be working, some of the officers were required to cover more than one post. Because of concerns over security, DCGH decided to establish a new security post (Post 12) and the Union was notified of that decision on November 9, 1990. Although with the establishment of Post 12, the hours of coverage on the existing overflow Post (Post 11) were to be reduced, the overall effect of the change was to increase the number of hours of coverage required and to increase the staffing requirements on the nighttime shift from 5 to 6 officers. Prior to the implementation of the change on November 16, 1990, the Union notified Margaret Evans, security and law enforcement manager at DCGH that it wished to bargain over the impact this change would have on employee working conditions. Evans was willing to consult with and receive input from the Union concerning the change, but she took the position that DCGH had no obligation to bargain over such matters.

Issue

Was the Respondent under an obligation to bargain, upon request, with the Union over the impact the establishment of Post 12 would have on employee working conditions?[1]

Findings of Fact

There are no serious credibility issues to be resolved in this proceeding. Although Respondent contends that the establishment of Post 12 did not produce any changes in employee working conditions, Security Manager Evans, in her testimony, admitted that, after the change, overtime increased and the staffing requirements on the nighttime shift went from 5 to 6 officers. Although Evans was inclined to attribute the increase in overtime to employees calling in sick, I do not find such an assertion to be credible. The evidence clearly shows that long before the establishment of Post 12, the security detail was seriously understaffed and that, due to the dangerous nature of the work, injuries are an everyday fact of life. Security Manager Evans testified that staffing is below the authorized number and that she would like to hire 6 or 7 more officers. So, for whatever reason, DCGH's security force is seriously undermanned and it is necessary for the officers to work overtime

[1]The Union admits that Respondent was under no obligation to bargain over the decision to establish Post 12. The Union also indicates its intention not to pursue the claim that Respondent violated Section 1-618-4(a)(2) and (3) of the CMPA and the D.C. Code.

on a regular basis. The evidence also shows that even with the cutback in hours of coverage on the overflow Post, the establishment of Post 12 resulted in an increase of 77 hours of coverage per week. I find that the implementation of the decision to add Post 12 increased the number of hours of overtime that employees were required to perform and that this had a significant impact on employee working conditions.

The Union contends that the impact of the change can be demonstrated in other ways. It claims that light duty assignments were limited, general stress increased and leave denials became more frequent. As to the first, the Union contends that there was an agreement with DCGH that certain posts (Post 1 and the overflow Post) were light duty assignments and officers who had been injured and were returning to work on a limited basis were to be assigned to such Posts. I find that there was no agreement, either formal or informal, that certain Posts were light duty assignments. Rather, the record shows that when an injured officer returned to work, his or her doctor often cleared the officer for a particular type of duty. In such circumstances, the Union and DCGH arrived at an ad hoc agreement to assign the officer duties that he or she was physically able to perform. With respect to the increase in general stress, that argument is based upon the claim that the reduction in hours at the overflow Post left less opportunity for light duty assignments. As I have found that there was no agreement or understanding that certain Posts were to be designated as light duty Posts, I cannot find that the reduction of coverage hours at the overflow Post was a change which produced a more stressful environment.[2] The simple fact of the matter is that the job of Special Police Officer at DCGH is inherently dangerous and stressful. As to the last point, that leave denials became more frequent, this is consistent with my earlier finding that the change increased the amount of mandatory overtime the officers were required to perform, but, in my opinion, it does not add anything to that earlier finding.

Discussion

(a) Post-Hearing Motions

The Union has moved to reopen the record for the purpose of adducing evidence as to the amount of overtime performed by bargaining unit employees. DCGH has filed a response, opposing this request. In addition, DCGH has filed a motion with the Board requesting a ruling on the Union's post-hearing request for overtime information and the Union has filed its response to this motion.

---

[2]At the hearing, the parties stipulated that concerns over asbestos as a safety problem were no longer an issue in the case.

Concerning the motion to reopen the record, the rule is well established that the moving party hears the responsibility for establishing that the evidence to be adduced is newly discovered or that it was previously unavailable. Here, the burden has not been met. The issue of employee overtime not only was raised during the hearing, it was also raised in the documents supporting the original charge filed in this proceeding.[3] In such circumstances, I am constrained to find that the evidence that the Union seeks to introduce is neither newly discovered, nor previously unavailable. Accordingly, the motion to reopen the record is denied. Concerning DCGH's request for a ruling on the Union's subsequent request for information, that request falls into the category of a request for a declaratory judgment, which PERB under its procedures will not entertain. Accordingly, DCGH's request is also denied.

(b) The Record Evidence

In light of my finding that the creation of Post 12 increased the amount of mandatory overtime unit employees were required to perform and that this had a significant impact on existing working conditions, it would normally follow that Respondent was obligated to bargain upon request over the effects of these changes. However, one of the principal issues in this case is whether or not the union contractually waived to right to bargain over such matters. The argument that the right was indeed waived is based upon Article 3, Section A, the management rights clause of the contract and Article 5, Section F of this agreement which discusses changes in employee working conditions. Article 3, Section A is an extremely broad management rights clause which in relevant part[4] provides that DCGH shall have the

---

[3]See the December 5, 1990 affidavit of Keith Schnell which was submitted with the charge.

[4]Section A reads as follows:

In accordance with Section 1708 of the Comprehensive Merit Personnel Act, Management shall retain the sole right in accordance with applicable laws, rules and regulations:

1. to direct employees of the agency;

2. to hire, promote, transfer, assign and retain employees in positions within the agency and to suspend, demote, discharge or take other disciplinary action against employees for cause;

exclusive right to hire, promote, transfer, assign and retain employees in positions within the agency. It also provides that DCGH will have the right to determine, its organization, the number of employees and the number, types and grades of positions of employees assigned to an organizational unit. It would see clear that under this provision, the Union would have no right to bargain over the creation of a new security post, the transfer or assignment of employees to different posts or the failure of DCGH to hire a sufficient work complement of employees to cover the assigned tasks. While the clear and unambiguous language of this Section does not preclude bargaining over the effects of overtime, it does prevent the Union from seeking by way of bargaining what would seem to be the solution to its problem - the hiring of additional staff and/or a reduction in the number of assigned posts.

Article 5, Section F, on the other hand, directly addresses the question in issue. It provides as follows:

> Section F
>
> The Employer agrees that it will notify and, upon request, consult with the Union as far in advance as is possible prior to the implementation of new (or change of existing policies, practices, and/or regulations related to bargaining unit working conditions. The Union may submit to Management written comments prior to the prospective date of such implementation or changes. In the event of emergency situations it is understood that no such notification will be required.
>
> Such issues shall be considered appropriate for discussion at Labor-Management meetings.

---

3. to relieve employees of duties because of lack of work or other legitimate reasons;

4. to maintain the efficiency of the District Government operations entrusted to it;

5. to determine the mission of the agency; its budget, its organization, the number of employees and the number, types, and grades of positions of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work, or its internal security practices; and

6. to take whatever actions may be necessary to carry out the mission of the District Government in emergency situations.

The above provisions speaks in terms of consulting with, rather than bargaining with the Union over matters that relate to working conditions and refers to the acceptance of written comments, making no provision for discussion. Obviously the words, to consult with, cannot be interpreted as an agreement to bargain and the right to submit written comments cannot be equated with the right to discuss. The language of Section F is clear and unambiguous and it clearly limits the Union's role to one of an advisory capacity. Although this Section does not expressly state that the Union is waiving its right to bargain over such matters, the limited rights afforded to the Union by Section F strongly suggest that the Union has in fact waived its right to bargain over the effects of such changes. I am aware of the fact that the overwhelming body of case law cautions that a waiver of this kind is not to be lightly inferred and that such a waiver must be clear and unmistakable. And, I of course accept this statement of law in resolving this issue. However, the severe limitations put on the Union's right to bargain by Section F lead me to conclude that there is clear and unmistakable evidence that the Union has waived its rights to bargain over such matters. To hold otherwise would require that I ignore completely the clear and specific language of Article 5, Section F and conclude that it has no real meaning or purpose. Every provision in a collective bargaining agreement must be deemed to have some purpose and intent and when, as here, the language is not subject to different and varied interpretations; it must be interpreted in a manner consistent with its plain language. Applying that test, I conclude that the purpose and intent of Article 5, Section F was to deny the Union the right to bargain over such changes or the effects of such changes and that by agreeing to Article 5, Section F, the Union contractually waived its bargaining rights.[5] Accordingly, I conclude that Respondent did not violate Section 1-618-4(a)(1) and (5) of the CMPA and the D.C. Code and I will recommend that the complaint be dismissed in its entirety.

Conclusions of Law

1. Respondent did not violate Section 1-618-4(a)91) and (5) of the CMPA and the D.C. Code by refusing to bargain with the

---

[5]At the hearing and in his brief, counsel for the Union noted that he is reserving the right to address the waiver issue at a later time before the Board. I have found, of course, that the waiver issue is before me based upon the collective bargaining agreement and Respondent's contention that the Union's bargaining rights concerning such change were waived by the agreement.

Union over the effects that the establishment of Post 12 had upon employee working conditions.

2. Respondent did not engage in violations of the CMPA and the D.C. Code as alleged in the complaint.

Recommendation

I recommend that the complaint be dismissed in its entirety.

December 14, 1991
Dated

Robert J. Perry
Hearing Examiner