

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so 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, LOCAL 3721,)	PERB Case No. 01-U-29
)	
Complainant,)	Opinion No. 706
)	
)	
)	
v.)	
)	
DISTRICT OF COLUMBIA)	
FIRE AND EMERGENCY SERVICES)	
DEPARTMENT,)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3721 ("Complainant", "AFGE" or "Union") against the District of Columbia Fire and Emergency Services Department ("Respondent", "FEMS" or "Agency"). Specifically, AFGE alleges that FEMS committed an unfair labor practice by engaging in improper direct dealing with its members and unlawfully polling its members concerning competing proposals. ¹ (See: R & R at p. 4). Furthermore, AFGE claims that FEMS violated D.C. Code §1-

¹Both AFGE Local 3721 and IAFF, Local 36 represent FEMS employees. While AFGE Local 3721 represents emergency medical service workers, the International Association of Firefighters, Local 36 (IAFF) represents uniformed firefighters at FEMS. The record indicates that for some time the parties have confronted the possibility that FEMS would introduce the concept of dual role cross-training, whereby individuals trained as both fire fighters and paramedics would ride on fire engines and, as such, would be covered by the collective bargaining agreement between FEMS and IAFF, Local 36. (R & R at pg. 2). In AFGE's view, the effect of FEMS's proposal would cause emergency medical service workers to leave Local 3721 to assume roles as firefighters, where they would be represented by another Union.

617.04 (a)(2),(3) and (5) (2001 ed.)², by issuing and circulating without the Union's knowledge or consent, a memorandum and questionnaire polling members' interest in a proposal that would significantly alter their terms and conditions of employment.³

The Respondent denies the allegations. Specifically, FEMS claims that it did not improperly poll employees or engage in direct dealing with them. Instead, FEMS describes its communication to employees as "non-coercive" and as a "survey which simply seeks to gauge employees' interest in cross training." (R & R at p. 4). FEMS relies on National Treasury Employees Union v. Federal Labor Relations Authority (NTEU v. FLRA) ⁴ to support its contention that it is lawful to directly communicate with its employees for purposes other than collective bargaining, insofar as such communications foster effective and efficient government. 826 F. 2d 114 (D.C. Cir. 1987). While acknowledging that the Memorandum makes mention of "incentive pay", the Agency argues that since the issue has not been "finalized", there is "not yet any obligation for the Agency to notify the Union and to bargain." (R & R at p.4).

A hearing was held and the Hearing Examiner issued a Report and Recommendation. (R & R). The Hearing Examiner found that the Respondent violated D.C Code §1-617.04 (a)(2),(3) and (5). Specifically, the Hearing Examiner found that FEMS committed an unfair labor practice

²Throughout this Opinion, all references to the D.C. Code refer to the 2001 edition, unless otherwise stated.

³This dispute arises out of AFGE's objection to FEMS's act of sending out a Memorandum and Survey dated July 23, 2001, which concerned members' interest in dual role cross training (training EMT's to be firefighters or vice versa) and where an incentive for participating in the cross training was mentioned in the communication. (R & R at p.2) AFGE argues, *inter alia*, that the Memorandum and Survey go beyond mere information gathering because the documents: (1) asked for personal information, such as name and years of service; (2) solicited open-ended comments, which could be used to undermine the Union in any subsequent negotiations between AFGE and FEMS; and (3) suggested that a financial incentive would be offered to those who expressed a preference toward cross-training. (R & R at p. 4).

⁴ In the NTEU v. FLRA case, the United States Court of Appeals for the District of Columbia found that the IRS' action of surveying employees about a number of issues (including the use of computers, time needed for training, career interests, and skills), did *not* constitute improper polling regarding terms and conditions of employment. 826 F. 2d 114 (D.C. Cir. 1987). In fact, the court found that the use of a questionnaire by the IRS, was a "proper information gathering mechanism." Id. In reaching that conclusion, the court balanced the right of employees to exclusive representation with the "advancement of governmental effectiveness and efficiency." Id. As a result, the court concluded that the latter should not be "subordinated" to the former. Id.

by engaging in improper polling and by offering a financial incentive to employees who express a preference for cross training. Relying on the Board's precedent in Fraternal Order of Police /Metropolitan Police Department Labor Committee v. Metropolitan Police Department, the Hearing Examiner determined that FEMS's July 23, 2001, Memorandum and Survey crossed the line of mere information gathering and is better characterized as an improper attempt by the Agency to bypass the Union by seeking employee views on alternate proposals. 48 D.C. R. 8530, Slip Op. No. 649, PERB Case No. 99-U-27 (2001). Furthermore, the Hearing Examiner found that FEMS sought through communication with membership to solicit input on its preference between competing proposals, under circumstances where, as noted, some change was forthcoming. (R & R at p. 7). Therefore, he concluded that FEMS acted unlawfully when it sought input from Local 3721 membership without going through the members' exclusive bargaining agent. This was the case despite the fact that the subject matter involved a management right which could be implemented without bargaining.

As a remedy for the unfair labor practice committed, the Hearing Examiner recommended that the Board issue an Order directing the Respondent to cease and desist from violating D.C. Code 1-617.04 (a)(2), (3) and (5), by communicating directly with AFGE's members over terms and conditions of employment. In addition, the Hearing Examiner recommended that the Board issue an Order directing the Respondent to:(1) rescind the July 23, 2001 Memorandum and Survey; (2) refrain from using any data it obtained from the use of memorandum and survey for any purpose; and (3) post a notice of its violation of law.

Neither party filed exceptions to the Hearing Examiner's Report and Recommendation.

Pursuant to D.C. Code §1-605.02(3)(2001 ed.) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and finds them to be reasonable, supported by the record, and consistent with Board precedent. As a result, we adopt the Hearing Examiner's findings and recommended remedy and direct that the Respondent cease and desist from communicating with AFGE's members over terms and conditions of employment.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Fire and Emergency Medical Services Department (FEMS), its agents and representatives, shall cease and desist from violating D.C. Code § 1-617.04 (a)(2), (3) and (5), by the acts and conduct set forth in this Opinion.
2. FEMS, its agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act (CMPA) in any like or related matter.
3. FEMS, its agents and representatives, shall cease and desist from interfering with the American Federation of Government Employees, Local 3721's rights as exclusive bargaining agents.
4. FEMS shall rescind the July 23, 2001 Memorandum and Survey and refrain from using the data obtained from the poll for any purpose.
5. FEMS shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice, where notices to employees are normally posted.
6. Within fourteen (14) days from the date of this Decision and Order, FEMS shall notify the Public Employee Relations Board (PERB), in writing, that the attached Notice has been posted accordingly, and as to the steps it has taken to comply with paragraphs 4 and 5 of this Order.
7. Pursuant to Board Rule 559.1, this Order shall be final upon issuance.

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

April 11, 2003



Public
Employee
Relations
Board

Government of the
District of Columbia



717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA FIRE AND EMERGENCY SERVICES DEPARTMENT (FEMS), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 706, PERB CASE NO. 01-U-29 (April 11, 2003).

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 WILL cease and desist from violating D.C. Code §1-617.04 (a) (2), (3) and (5) by the actions and conduct set forth in Slip Opinion No. 706.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA) to freely: (a) form, join, or assist any labor organization and (b) bargain collectively through representatives of their own choosing.

WE WILL cease and desist from interfering with the American Federation of Government Employees, Local 3721's rights as exclusive bargaining agents.

WE WILL immediately rescind the Memorandum and Survey issued on July 23, 2001 to all Emergency Medical Services Bureau employees which notified them of FEMS's intent to implement a "Dual Role Cross Training Initiative" which would offer incentive pay to members who completed the cross training and accepted Firefighter /Paramedic positions.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Fire and Emergency Services
Department

Date: _____ By _____
Director

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 this Notice or compliance with any of its provisions, they may communicate directly with the Public Employees Relations Board, whose address is: 717 14th Street, N.W., Suite 1150; Washington, D.C. 20005. Phone: (202) 727-1822.

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

April 11, 2003