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that the District of Columbia Department of Corrections (“Respondent”, “Agency” or “DOC”) committed multiple unfair labor practices in violation of the Comprehensive Merit Personnel Act (“CMPA”). This consolidated complaint arises out of several actions that were taken by DOC in order to comply with the District of Columbia National Capital Revitalization and Self Government Act of 1997 (“Revitalization Act” or “Act”). This Act required the closure of several correctional facilities and the drastic downsizing of DOC. As a result, DOC planned several Reductions-in-Force (RIFs) scheduled to take place on June 16, 2000 and September 30, 2000. Many of the unfair labor practice allegations contained in FOP’s complaint relate to DOC’s alleged failure to bargain with FOP’s new Chairman over issues concerning the planned RIFs and other resultant effects of the reorganization.<sup>2</sup>

Specifically, FOP asserts that DOC violated D.C. Code §1-617.04 (a)(1), (2),(3) and(5) (2001)<sup>3</sup> by refusing to engage in impact and effects bargaining concerning:(1) a June 16, 2000

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<sup>2</sup> On June 1, 2000, William Dupree succeeded Clarence Mack as the Chairman of the FOP. Dupree wished to bargain over the June 16<sup>th</sup> RIF when he took office. However, DOC asserted that they had bargained with Dupree’s predecessor over the impact and effect of the June 16<sup>th</sup> RIF. FOP denied that assertion by stating that they had no evidence of such bargaining sessions.

<sup>3</sup> Prior codification at D.C. Code §1-618.4 (a)(1), (2),(3) and(5) (1981). The parties’ and the Hearing Examiner’s citations to the D.C. Code refer to the 1981 edition. However, all citations to the D.C. Code contained in this opinion refer to the 2001 edition.

D.C. Code §1-617.04 (a)(1), (2), (3), and (5) (2001) ( Unfair Labor Practices) provides in pertinent part as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay...;

(3) Discriminating in regard to hiring or tenure of

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Reduction-in-Force (RIF); (2) the termination of two employees pursuant to the June 16<sup>th</sup> RIF; (3) the Reduction of the Escort Complement; (4) the summary removal of four employees pursuant to a newly amended discipline section of the District Personnel Manual; (5) a September 30, 2000 Reduction-in-Force (RIF); and (6) the creation of new non-bargaining unit Criminal Investigator positions. Also, FOP contends that DOC improperly implemented a newly amended discipline procedure and failed to timely effectuate promotions in accordance with a negotiated settlement agreement between the parties.<sup>4</sup>

DOC asserts that the changes it implemented were consistent with its powers under the CMPA, Chapter 16 of the District Personnel Manual (DPM), and the Management Rights provisions of the parties' collective bargaining agreement (CBA). As a result, DOC contends that it did not commit the alleged unfair labor practices.

A hearing was held and the Hearing Examiner issued a Report and Recommendation ( R & R).<sup>5</sup> The Hearing Examiner found that the Respondent did not violate D.C. Code §1-617.04

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employment or any term or condition of  
employment to encourage or discourage  
membership in any labor organization, except as  
otherwise provided in this chapter;

(5) Refusing to bargain collectively in good faith  
with the exclusive representative.

<sup>4</sup>The Hearing Examiner determined that the promotions took twelve months to be effectuated. ( R &R at p. 25). However, the Hearing Examiner's Report does not indicate how many employees were to receive promotions. ( R &R at pgs. 15-16).

<sup>5</sup> The Hearing Examiner noted that he did not discuss all of the allegations contained in FOP's consolidated complaint. He reasoned that the "Complainant, in its post hearing brief, substantially narrowed the focus of this proceeding, apparently having abandoned, in whole or in part, numerous of the unfair labor practices alleged in its consolidated complaint." ( R & R at 4). Also, the Hearing Examiner indicated that he thought one of the issues raised was a proper subject for a unit clarification petition, not an unfair labor practice complaint. ( R & R at p. 4). Therefore, pursuant to DOC's Motion to Dismiss, the Hearing Examiner dismissed an allegation concerning whether Criminal Investigator positions created in the Internal Affairs Unit were properly classified as non-bargaining unit positions. ( R & R at 4). The Board notes that this

(a)(1),(2),(3), and (5) (2001).<sup>6</sup> Therefore, he recommended that the consolidated complaint be dismissed. FOP filed Exceptions to the Hearing Examiner's R&R. The Hearing Examiner's R&R and FOP's Exceptions are before the Board for disposition.

## 2. The Hearing Examiner's Report and Recommendations and FOP Exceptions:

Based on the pleadings, the record developed in the hearing and the parties' post-hearing briefs, the Hearing Examiner identified eight issues for resolution. These issues, his findings and recommendations, and the parties Exceptions are as follows:

### **Failure to Bargain in Good Faith over June 16, 2000 RIFS**

- i. *Did DOC commit an unfair labor practice by refusing to bargain with the newly appointed FOP Chairman, William Dupree, over the June 16, 2000 RIF? Also, did DOC commit an unfair labor practice by failing to submit requested documentation concerning the RIF to Chairman Dupree?*

DOC argued that it did not have an obligation to bargain with Chairman Dupree or provide information concerning the June 16<sup>th</sup> RIF. DOC based its argument on its assertion that it had already bargained with Dupree's predecessor (Clarence Mack) over the impact and effects of the June 16<sup>th</sup> RIF. In addition, DOC claims that it had no duty to supply Chairman Dupree with information concerning DOC's reorganization because the Agency had already provided FOP with

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issue could also be a proper subject for a Unit Modification Petition pursuant to Board Rule 504.1(b).

Contrary to the Hearing Examiner's finding, the Board has addressed the issue of whether jobs are properly classified as bargaining unit or non-bargaining unit positions in the context of an unfair labor practice complaint. However, the facts of the Board's precedent in National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority, can be distinguished from the facts in the present case. 47 DCR 7551 Slip Op. No. 635 at pgs. 8-13, PERB Case No. 99-U-04 (2000). Hence, the Board finds that the Hearing Examiner's decision not to consider this issue in the context of the present unfair labor practice proceeding was reasonable. Further explanation concerning this conclusion is discussed in detail in a later section of this Opinion entitled "Refusal to Bargain over Creation of New Criminal Investigator Positions."

<sup>6</sup>Prior codification at D.C. Code §1-618.4 (a)(1),(2),(3), and (5) (1981).

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the requested information. As a result, DOC contends that FOP's claims lacked merit. ( R & R at p. 21).

FOP's Chairman Dupree alleged that on June 20, 2000, he made a request to bargain over the June 16<sup>th</sup> RIF. ( R & R at p.21). Therefore, Dupree claims that DOC was obligated to provide relevant documents concerning the RIF. ( R & R at 21). In addition, FOP cited Board precedent to support its argument that: (1) DOC had not fulfilled its bargaining obligation to the Union; and (2) prior bargaining with the Union's prior administration did not constitute a "clear and unmistakable waiver" of the Union's bargaining rights. <sup>7</sup> ( R & R at p. 21).

The Hearing Examiner found that there was no evidence on the "record to substantiate Dupree's claim that he requested to engage in impact and effects bargaining over the June 16<sup>th</sup> RIF " or failed to provide documents related to that RIF. ( R & R at p. 29). On the contrary, he found that there was some evidence that the Agency had bargained with and provided Dupree's predecessor with documents<sup>8</sup> concerning the June 16<sup>th</sup> RIF. In addition, the Hearing Examiner

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<sup>7</sup>FOP relied on several cases to support its claims: American Federation of Government Employees Local 872 v. District of Columbia Department of Public Works, 49 DCR 1145, Slip Op. No. 439, PERB Case Nos. 94-U-02 and 94-U-08 (2002) (where the Board held that "consultation" was not enough pursuant to the CMPA to fulfill the bargaining obligations concerning an implemented RIF); Doctors Council of District of Columbia General Hospital v. District of Columbia General Hospital 43 DCR 5142, Slip Op. No. 468, PERB Case No. 94-U-12(1996)(where the Board held that the Agency had violated the CMPA by failing to: (1) bargain in good faith concerning an impending RIF; and (2) provide documents related to that RIF); and National Association of Government Employees Local R3-06 v. D. C. Water and Sewer Authority, 47 DCR 7222, Slip Op. No. 635, PERB Case No. 99-U-04 (2000) (where the Board held that despite its designation as an at-will employer pursuant to the Omnibus Consolidated Rescissions and Appropriations Act of 1996, WASA violated the CMPA by refusing to bargain over the impact and effects of various aspects of a RIF). However, we find that the cases cited by FOP can be distinguished from the case presently before the Board. Specifically, none of the cases cited by the Complainant involve a situation where an Agency had previously bargained with a Union's former leader over the same RIF that was the subject of the unfair labor practice claim. Moreover, we find no authority to support FOP's claim that DOC was obligated to bargain with the new Chairman over an issue that had previously been bargained with another leader. Furthermore, the Board is not persuaded by the authority cited by FOP on this point. Therefore, we find that FOP's argument on this issue lacks merit.

<sup>8</sup>Evidence in the record suggested that FOP's previous administration did not provide Dupree with: (1) access to the Union's files; and (2) any records related to previous RIFs, including notes concerning previous impact and effects bargaining sessions, administrative

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found that “there is no basis on this record for concluding that the Union has a right to renew once-completed impact and effects bargaining over a RIF upon the occasion of a change in Union leadership.”<sup>9</sup> ( R & R at p. 32). After determining that FOP’s allegation was not supported by the evidence in this case, the Hearing Examiner concluded that DOC did not commit the unfair labor practice alleged above. ( R & R at 32 and 33).

FOP did not address this finding in its Exceptions.

The Board has held “that the effects or impact of a non-bargainable management decision, such as a RIF, upon the terms and conditions of employment is bargainable upon request.” See, International Brotherhood of Police Officers and D.C. General Hospital. 39 DCR 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). However, the issue of whether there has been a timely request for bargaining is often a question of fact. In the present case, the Hearing Examiner found that there was no such request. Therefore, he concluded that DOC did not have a duty to bargain over the issue.

After reviewing the record, we conclude that the Hearing Examiner’s findings on the issue is reasonable and consistent with Board precedent.

**Termination of two employees, Hakim and Johnson**

- ii. *Whether DOC committed an unfair labor practice by terminating two employees through the June 16<sup>th</sup> RIF without first bargaining over its decision?*

FOP alleges that DOC committed an unfair labor practice in violation of D.C. Code §1-617.04(a)(1) and (5) (2001)<sup>10</sup> by failing to bargain in good faith over the termination of two

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orders, or retention rosters. ( R & R at p.6). Nonetheless, the Hearing Examiner noted that the Agency “ought, in the interest of mature labor relations, provide the requested information to the Union (even if they believe they had provided it to Dupree’s predecessor) or explain that no such information exists.” ( R & R at p. 33).

<sup>9</sup>The Hearing Examiner added that the Union failed to cite any authority to support its claim that it has the right to bargain over an issue that has already been the subject of impact and effects bargaining. ( R & R at p. 32).

<sup>10</sup> Prior codification at D.C. Code §1-618.4(a)(1) and (5) (1981).

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employees who were separated from service pursuant to the June 16<sup>th</sup> RIF.<sup>11</sup> In addition, FOP claims that DOC improperly posted and filled vacancies in non-bargaining unit classifications that perform duties similar to those of bargaining unit members, Hakim and Johnson. As a result, the Union requests that the employees be reinstated with back pay pending the conclusion of impact and effects bargaining.

DOC claims that both employees were separated lawfully pursuant to the June 16<sup>th</sup> RIF. As a result, FOP's allegations relating to Hakim and Johnson are unsubstantiated and must be dismissed. In support of its argument, DOC asserts that it did not exhibit any anti-union animus toward Hakim and Johnson. DOC points to the fact that both enjoyed priority placement rights and were given the opportunity to apply for other positions that were available in their work area. However, they were not chosen to fill the positions because they either (1) did not apply or (2) were not qualified for the positions that were available. DOC also argues that the claims concerning Hakim are unsubstantiated and should be dismissed because she did not testify regarding the circumstances of her separation.

As discussed above, the Hearing Examiner found that the record did not show that Dupree requested to engage in impact and effects bargaining over the June 16<sup>th</sup> RIF or the terminations of Hakim and Johnson. As a result, the Hearing Examiner concluded that DOC did not commit an unfair labor practice by failing to bargain over the termination of Hakim and Johnson pursuant to the June 16<sup>th</sup> RIF. In light of the above, the Hearing Examiner recommended that this allegation be dismissed.

FOP did not file Exceptions to the Hearing Examiner's finding on this issue.

Consistent with the above, the Board finds that the Hearing Examiner's finding on this issue is supported by the record. As a result, we adopt this finding.

### **Reduction of Escort Complement**

3. *Did DOC commit an unfair labor practice by failing to bargain over the impact and effects of reducing the number of officers used to escort inmates to D.C. General Hospital?*

FOP claims that DOC wrongfully reduced the number of officers used to escort inmates to

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<sup>11</sup>The employees were Taslim Hakim (Legal Instruments Examiner) and Jean Johnson (Program Analyst).

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D.C. General Hospital (DCGH) without bargaining over the impact and effects of that decision.<sup>12</sup> ( R & R at p. 20). Relying on AFSCME, Dist. Council 20, et. al. v. Government of the District of Columbia and Williams, FOP asserts that the “discontinuance of this established practice (of having a larger number of officers on duty) is a pervasive unilateral change and violates D.C. Code §1-617.04 (a)(1) and (5)(2001)<sup>13</sup>.” ( Complainant’s brief at p. 5); 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999). Specifically, FOP claims that the level of the Escort Complement had been established through past practice and concerns a negotiable term and condition of employment <sup>14</sup>( R & R at 20).

FOP also argues that the reduction in the Escort Complement is a change in a negotiable term and condition of employment that must be bargained pursuant to the CMPA<sup>15</sup>. ( Complainant’s Brief at p. 5). In so arguing, FOP asserts that the Agency has not supported its claim that the issue falls outside of the presumption of negotiability pursuant to D.C. Code §1-617.08(b).<sup>16</sup> ( R & R at p.20). As a result, FOP claims that DOC violated the CMPA by changing the level of the Escort Complement without bargaining over the issue. FOP also argues that “a request to bargain is not

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<sup>12</sup>The Hearing Examiner found that in October 1999, DOC raised the Escort Complement to well above the nationally acceptable standard, after an inmate overtook a guard at D.C. General Hospital and a shootout ensued. ( R & R at p. 13). In reaching this conclusion, the Hearing Examiner relied on Deputy Director Anthony’s testimony that the current level of Escort Complement is higher than that of the pre-October 1999 and higher than the national standard. ( R & R at 13).

<sup>13</sup>Prior codification at D.C. Code §1-618.4 (a)(1) and (5)(1981).”

<sup>14</sup>In AFSCME, Dist. Council 20, et. al. v. Government of the District of Columbia and Williams, the Board held that the Chief Financial Officer had repudiated the bargaining relationship with employees represented by Council 20 and made pervasive unilateral changes when it, *inter alia*, refused to recognize Council 20 as the exclusive bargaining agent for its employees and refused to follow the Master Agreement that had been negotiated by the bargaining unit members’ former employers. Id.

<sup>15</sup>FOP makes this second and distinct argument in its brief, even though it was not originally alleged in the Complaint.

<sup>16</sup>D.C. Code §1-617.08 sets forth Managements’ rights which are not subject to collective bargaining under the Labor-Management provisions of the CMPA. Also, D.C. Code §1-617.08 (b) provides that “all matters are deemed negotiable, except those that are proscribed by this subchapter...” This section was previously codified at D.C. Code §1-618.8. (1981).

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a prerequisite to a statutory violation ( in this case), and that the change must be negotiated.” ( R & R at p. 20). Finally, FOP contends that its claim is not mooted by the impending closure of DCGH because the Escort Complement issue could arise at some other health care facility. ( R & R at p. 20 and Complainant’s Brief at p. 5).

DOC contends that :(1) FOP never made a clear serious request to bargain over the issue, nor did it identify or clarify its specific concerns regarding the Escort Complement issue; and (2) there is no duty to bargain over the Escort Complement issue because DOC lawfully made this change pursuant to the Management Rights provisions of D.C. Code §1-617.08(a)(2) (2001).<sup>17</sup> Instead, DOC asserts that the Union “merely left a telephone message with the Director’s office regarding the issue and then filed this unfair labor practice charge.” ( R & R at 20 and 21) .

The Hearing Examiner concluded that the Escort Complement issue is a matter that is subject to impact and effects bargaining, *upon request*. ( R & R at p. 30). However, the Hearing Examiner determined that there was no evidence of a request to bargain over the inmate escort issue; therefore, management had no duty to bargain over the impact and effects of the change. ( R & R at p. 30). The Hearing Examiner also noted that DOC’s action in changing the Escort Complement could *not* be characterized as a “pervasive unilateral change”.( R & R at p. 30). Finally, the Hearing Examiner determined that the present case is distinguishable from the AFSCME, Dist. Council 20, et. al. v. Government of the District of Columbia and Williams case. 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999). The Hearing Examiner rejected FOP’s argument that there was a pervasive unilateral change by stating the following: “Unlike (PERB) Case No. 97-U-15A, there is no evidence in this proceeding even approaching proof of pervasive unilateral changes or that the Agency repudiated<sup>18</sup> the parties’ collective bargaining agreement. ” ( R & R at p. 30 ). As a result,

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<sup>17</sup> As noted in NAGE v. WASA, there is no requirement that the request to bargain be specific. 47 DCR 7551, Slip Op. No. 635, PERB Case No. 99-U-04 (2000). In NAGE v. WASA, the issue was whether NAGE made a clear demand to negotiate over WASA’s reorganization. Id. The Board noted that “even a broad, general request for bargaining implicitly encompasses aspects of a matter, including the impact and effect of a management decision that is not otherwise bargainable.” Id. In the present case, the clarity of the request is not relevant because the Hearing Examiner made a finding that DOC did *not* make a request. As a result, he found that DOC did *not* commit an unfair labor practice by failing to bargain over the Escort Complement issue.

<sup>18</sup>The Hearing Examiner noted that while the complaint does not allege any repudiation of the parties’ collective bargaining agreement, there is some question as to the legal status of the parties’ Working Conditions Agreement. ( R & R at p. 30). This issue concerns FOP’s assertion that DOC has not been following the Agreement’s established arbitration procedure. ( R & R at 30). The Hearing Examiner concluded that the evidence shows that the Agency has been

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he found that the Agency did *not* commit an unfair labor practice by implementing a change in the Escort Complement without bargaining over the issue. ( R & R at p. 30).

FOP filed Exceptions concerning the Hearing Examiner's finding on this issue. In its Exceptions, FOP repeats its argument that in changing the Escort Complement, DOC was not exercising a management right pursuant to D.C. Code §1-617.08<sup>19</sup>. ( Exceptions at p. 8). Instead, it was implementing a unilateral change in the terms and conditions of employment that had been established by mutually accepted past practice since October 1999. (Exceptions at p. 8). Therefore, a request to bargain over the change was not required. ( Exceptions at p. 8).

The Board has held that the impact and effect of a non-bargainable management decision which affects terms and conditions of employment is bargainable upon request. See, International Brotherhood of Police Officers and D.C. General Hospital. 39 DCR 9633, Slip Op. No. 322 at p. 3, PERB Case No. 91-U-14 (1992). In the present case, we believe that the record supports the Hearing Examiner's finding that a request to bargain over the impact and effect of a change in Escort Complement was required. Furthermore, the record supports the Hearing Examiner's finding that FOP had never requested to bargain with DOC over the Escort Complement issue. ( R & R at p. 30).

The Board has also indicated that a pervasive unilateral change occurs where an employer unilaterally changes a past practice which affects a term and condition of employment without giving the Union an opportunity to bargain over the issue. See, University of District of Columbia Faculty Association/NEA v. University of the District of Columbia, 43 DCR 5594, Slip Op. No. 387 at pg. 2, PERB Case Nos. 93-U-22 and 93-U-23 (1996) ( where the Board held that UDC's decision to change two provisions in the faculty's collective bargaining agreement did not constitute a pervasive unilateral change.). In the present case, the level of the Escort Complement had not been established through past practice<sup>20</sup> nor had it been addressed in the parties' collective bargaining

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operating under the 1986 Working Conditions Agreement, as a matter of past practice for some time. Therefore, he concluded that repudiation was not an issue. ( R & R at 31 ).

<sup>19</sup>Prior codification at D.C. Code §1-618.8(1981).

<sup>20</sup>Whether or not a mutually acceptable past practice has been established between parties is a factual determination to be made by the Hearing Examiner. See, AFSCME, Dist. Council 20, et. al. v. Government of the District of Columbia and Williams (where the Board upheld a Hearing Examiner 's factual finding that a past practice of allowing union representatives to be present at non-disciplinary meeting existed.) 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1996) and 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999). In the case presently before the Board, the Hearing Examiner made a finding that the evidence did not establish that there was a past practice of maintaining the Escort Complement at a certain level.

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agreement, thus, there was no duty to bargain over the issue, absent a request to bargain over the impact and effects of the change.

In view of the above, the Board concludes that the Hearing Examiner's findings on this issue are reasonable and supported by the Board's precedent in University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia and AFSCME, Dist. Council 20, et. al. v. Government of the District of Columbia and Williams . 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1996) and 46 DCR 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999). Therefore, the Board adopts the Hearing Examiner's findings on this issue.

**Summary Removal of Four Employees**

4. *Did DOC commit an unfair labor practice by summarily removing four officers pursuant to new provisions of Chapter 16 of the District Personnel Manual, without first engaging in impact and effects bargaining over the implementation of revised Chapter 16 and the resulting summary removals?*

FOP contends that DOC wrongfully removed four (4) officers in August 2000 pursuant to newly implemented summary removal procedures that changed the discipline procedure outlined in the parties' working conditions agreement.<sup>21</sup> The Hearing Examiner noted that the arguments made by FOP in its original complaint and in its post-hearing brief were different.

In its original complaint, FOP asserted that DOC committed an unfair labor practice by failing to engage in impact and effects bargaining over the summary removal of four bargaining unit

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<sup>21</sup>FOP relies on the Board's decision in Fraternal Order of Police/ Metropolitan Police Department Labor Committee and International Association of Firefighters, Local 36 v. Office of Labor Relations and Collective Bargaining(FOP and IAFF v. OLRCB) to support its contention that DOC's unilateral modification of existing terms of employment (discipline procedure) constitutes an unlawful refusal to bargain in good faith over DOC's decision to implement the newly amended Chapter 16 of the DPM. 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 85-U-01 and 84-U-15 (1984). As a result, FOP asserts that DOC's actions violated D.C. Code §1-617.04 (a)(1)(5) (2001). In FOP and IAFF v. OLRCB, the Agency discontinued optical and dental benefits for employees after the parties' collective bargaining agreement expired, but during the re-negotiation period Id. The Board held that this act was patently coercive and in violation of D.C. Code §1-617.04(a)(1)(2001). Id. The Board also held that OLRCB's actions of changing the existing contract terms was plainly a refusal to bargain collectively in good faith in violation of 1-617.04(a)(5)(2001). Id.

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members who were separated from service pursuant to a newly amended discipline section (Chapter 16) of the District Personnel Manual (DPM). Additionally, FOP claimed that DOC committed an unfair labor practice by failing to engage in impact and effects bargaining over the newly amended Chapter 16.

However, in its post-hearing brief, FOP made a different allegation by asserting that DOC unilaterally modified existing employment terms, thereby refusing to bargain in good faith in violation of D.C. Code §1-617.04(a) (5)<sup>22</sup>. ( R & R at p. 24). Also, in its post-hearing brief, FOP argues that the issue was bargainable under the CMPA. Therefore, management's implementation of the DPM's newly amended Chapter 16, constitutes a unilateral modification of the parties' Working Conditions Agreement during the renegotiation period. Finally, in its post-hearing brief, FOP claims that DOC violated the duty to bargain in good faith by refusing to permit the terminated employees to arbitrate their removals pursuant to the relevant provision of the parties' collective bargaining agreement. However, the Hearing Examiner did not make a finding on this issue since this claim was not raised in the amended Complaint. On this basis, he determined that the issue was outside the scope of the amended complaint. ( R & R at p. 24).

DOC claims that the four officers who were originally terminated suffered no harm because three weeks after their termination, DOC consulted with the Union and placed the employees on administrative leave with retroactive pay and benefits. In addition, DOC claims that it properly exercised its right to discipline employees pursuant to Chapter 16 of the DPM. Moreover, DOC asserts that it had no duty to engage in any further bargaining because Chapter 16 was the subject of "extensive and exhaustive citywide bargaining and training sessions for...all Union and management officials prior to implementation."<sup>23</sup> ( R & R at p.23)

The Hearing Examiner found that DOC did not commit an unfair labor practice with respect to the allegation that it refused to engage in impact and effects bargaining with FOP over the summary removal of four employees. Specifically, the Hearing Examiner determined that there was no evidence that the Union ever requested to bargain over the impact and effects of the summary removal of the four officers, as required by the Board's precedent. Teamsters, Local Unions No. 639 and 730 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). Absent such a request, the Hearing Examiner concluded that there could be no finding of an unfair labor practice arising from either: (1) the failure to bargain over the impact and effects of management's decision to implement a new discipline procedure under Chapter 16; or (2) the

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<sup>22</sup>Prior codification at D.C. Code §1-618.4(a)(5).

<sup>23</sup> The Hearing Examiner rejected as unfounded management's claim that the Agency and the Union were party to "extensive and exhaustive citywide bargaining" over the implementation of the new Chapter 16. ( R & R at p. 23, footnote 4).

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decision to summarily remove employees pursuant to that procedure.

FOP's Exceptions do not allege any errors made by the Hearing Examiner during the proceeding. Instead, FOP uses its Exceptions to make allegations it failed to make in its original complaint. Specifically, FOP claims that: (1) DOC violated the CMLPA by unilaterally changing the discipline procedures without first giving the Union notice and an opportunity to bargain over the changes; and (2) the changes involved terms and working conditions between the parties. Moreover, FOP contends that, under these circumstances, no "request" to bargain is required. ( Exceptions at pg. 9). In addition, FOP asserts that by changing the discipline procedures, without first giving the Union an opportunity to bargain, DOC committed a *per se* unfair labor practice. See, FOP and IAFF v. OLR/CB, 31 DCR 6208, Case Nos. 85-U-01 and 84-U-15, Op. No. 94 (1984).

The Board has held that after a hearing is closed, a party cannot submit additional evidence.<sup>24</sup> Elliot v. D.C. Department of Corrections, 43 DCR 2940, Slip Op. No. 455 at p. 2, PERB Case No. 95-U-09 (1995). In the present case, FOP is seeking to provide the Board with additional evidence to support allegations not made in the consolidated complaint or at the hearing. Consistent with Elliot, we deny FOP's attempt to introduce new allegations. In light of the above, we conclude that the Hearing Examiner's findings with respect to the original allegations are supported by the record and by the Board precedent relied on by the Hearing Examiner. Therefore, we adopt these findings on the summary removal and Chapter 16 issues.

**Refusal to Bargain over the Impact and Effects of the September 30, 2000 RIF and Refusal to Provide Documents Related to this RIF**

*5. Did DOC commit an unfair labor practice by refusing to bargain over and provide documents related to a RIF that was announced for September 30, 2000?*

FOP argues that DOC committed an unfair labor practice in violation of D.C. Code §1-

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<sup>24</sup>In Elliot v. DOC, the Complainant did not make specific objections to the Hearing Examiner's findings and conclusions based on record evidence. Instead, the Complainant stated that there were errors in his own testimony made before the Hearing Examiner. Id. As a result, the Complainant requested that the Board reconsider the findings and conclusions of the Hearing Examiner based on submitted written testimony contained in his objections. Id. The Board held that once a hearing is closed, it will deny any request to re-open the Hearing to receive additional evidence absent compelling reasons. Id.

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617.04(a)(1) and (5) (2001)<sup>25</sup> by failing to bargain over and provide documents related to the impact and effects of a RIF announced for September 30, 2000. FOP also claims that a letter dated August 9, 2000, which was sent to the Deputy Director of the Department of Corrections, sufficiently states the Union's request to bargain over the RIF.

DOC contends that FOP's request to bargain was premature because the Mayor never signed the administrative order to effectuate the RIF; nor was a retention register prepared. In view of these facts, DOC asserts that: (1) it had no duty to engage in impact and effects bargaining since the September 30<sup>th</sup> RIF never occurred; (2) it was under no obligation to provide documents concerning the announced September 30<sup>th</sup> RIF; and (3) there was no "overarching reorganization plan" to provide to the Union in response to its request.<sup>26</sup> In light of the above, DOC asserts that it did not commit an unfair labor practice with respect to this allegation.

The Hearing Examiner was persuaded by FOP's argument that Chairman Dupree's August 9, 2000 letter to DOC's Deputy Director sufficiently stated the Union's request to bargain over the September 30<sup>th</sup> RIF. However, the Hearing Examiner determined that there was no evidence on the record to support the allegation that Management actually refused to bargain over the issue. Specifically, the Hearing Examiner found that the record evidence only indicates that DOC did not respond to Chairman Dupree's letter.<sup>27</sup> Therefore, the Hearing Examiner concluded that FOP should have made a second request to bargain under the precedent set forth in IBPO v. DCGH<sup>28</sup> because it "might well have dispelled any doubt as to the reason for any refusal to bargain". (R & R at p. 28). 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). The Hearing Examiner also determined that since the announced RIF was postponed and did not occur as scheduled, the request to bargain was premature.

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<sup>25</sup>Prior codification at D.C. Code §1-618.4(a)(1) and (5) (1981).

<sup>26</sup> DOC claims that it provided documents concerning DOC's reorganization to Chairman Dupree's predecessor.

<sup>27</sup>The Hearing Examiner also observed that there was no evidence that the Union sought to discover the reason for DOC's failure to respond to its request to bargain. ( R & R at pgs. 28 and 29).

<sup>28</sup>In IBPO v. DCGH, the Board held that DCGH had committed an unfair labor practice by refusing to bargain over the impact and effects of a management decision. International Brotherhood of Police Officers v. D.C. General Hospital. 39 DCR 9633, Slip Op. No. 322 at p. 3 and 4, PERB Case No. 91-U-14 (1992). On those facts, DCGH argued that it had "discussed" the matter with the Union. Id. The Board found that DCGH's act of merely "discussing" the matter was not sufficient to constitute bargaining. Therefore, the Board found that DCGH's actions constituted a "blanket refusal" to bargain over the issue. Id.

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On the issue of FOP's document request, the Hearing Examiner determined that DOC was not obligated to provide any documents relating to the announced RIF or the reorganization. This was the case particularly where the evidence suggested that the requested documents had been provided to Chairman Dupree's predecessor.

FOP's Exceptions essentially amount to a disagreement with the Hearing Examiner's finding that DOC did not commit an unfair labor practice by: (1) refusing to bargain over the impact and effect of the announced September 30<sup>th</sup> RIF; or (2) failing to provide documents related to that RIF. While FOP appears to agree with the Hearing Examiner's finding that the August 9, 2000 letter sufficiently stated the Union's request to bargain over the September 30<sup>th</sup> RIF, it disagrees with the Hearing Examiner's factual finding that the request to bargain over the RIF was pre-mature. FOP further asserts that there is no authority for the proposition that an administrative order and retention register must be created before management has a duty to bargain over the impact and effects of an announced RIF<sup>29</sup>. Finally, FOP argues that it did not have an obligation to repeat its request to bargain a second time, particularly where the parties had an antagonistic bargaining relationship. ( Exceptions at p. 4).

As previously noted, we have held that Unions generally have a right to engage in impact and effects bargaining concerning a RIF, only if they make a timely request to bargain. University of the District of Columbia Faculty Association/ NEA v. UDC, 29 DCR 2975, Slip Op. No. 43, PERB Case No. 82-N-01 (1982). Neither party disputes this statement of law. However, we believe that FOP's exception is primarily based on its assertion that its request to bargain was *not* pre-mature. In view of the above, FOP's Exceptions amounts to a mere disagreement with the Hearing Examiner's finding on this issue. We have found that a request to bargain is pre-mature where the Agency has not made its decision to implement a change or suspends implementation of a change. See, FOP/MPD Labor Committee v. MPD, 47 DCR 1449, Slip Op. No. 607 at Footnote 27, PERB Case No. 99-U-44 (2000). In addition, the Board has held that there is no duty to bargain over the impact and effect of a management decision unless and until management decides to implement a

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<sup>29</sup>FOP did not cite any authority for the proposition that DOC was obligated to bargain over an announced, but postponed RIF, where no administrative order had been signed by the Mayor or where no retention register had been created. In addition, we have no precedent on this issue nor could we locate authority from other labor relations agencies to support FOP's argument. Likewise, DOC did not cite any authority for its proposition that an Agency was not obligated to bargain over an announced, but postponed RIF, where no administrative order had been signed by the Mayor or where no retention register had been created. However, we have previously held that an Agency is not obligated to bargain over a decision until it decides to implement the decision. See, Id. The Board has also held that an Agency has no duty to bargain over a decision if it postpones implementation of the decision. See, Id.

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change. See Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, 47 DCR 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (2000). In the present case, the Hearing Examiner concluded that the RIF was never implemented; therefore, pursuant to our holding in FOP V. MPD, there was no duty to bargain over the September 30<sup>th</sup> RIF. Id.

Furthermore, we have held that a mere disagreement with the Hearing Examiner's finding does not constitute a valid exception or support a claim of reversible error. Hoggard v. District of Columbia Public Schools, 46 DCR 4837, Slip Op. No. 496, PERB Case 95-U-20 (1996). Therefore, we find that FOP's disagreement with the Hearing Examiner's findings does not present a basis for reversing or modifying the Hearing Examiner's conclusion.<sup>30</sup> Moreover, there is nothing in the record to support a reversal of this finding. As a result, we adopt the Hearing Examiner's finding that the request to bargain and provide documents concerning the September 30<sup>th</sup> RIF was pre-mature.

The Board held that 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 Local 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 (1991). However, the Board has also held that an unfair labor practice has *not* been committed until there has been a general request to bargain and a "blanket" refusal to bargain. International Brotherhood of Police Officers v. D.C. General Hospital, 39 DCR 9633, Slip Op. No. 322 at p. 3 and 4, PERB Case No. 91-U-14 (1992).

After reviewing the Hearing Examiner's report and the entire record, we find no merit to FOP's assertion that DOC's failure to respond to FOP's letter requesting bargaining constituted a

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<sup>30</sup>The Board has held that the Hearing Examiner has the authority to determine the probative value of evidence and to draw reasonable inferences from that evidence. Hoggard v. District of Columbia Public Schools, 46 DCR 4837, Slip Op. No. 496, PERB Case 95-U-20 (1996). The Board has also held that a mere disagreement with a Hearing Examiner's factual findings based on competing evidence is not a valid exception where the record evidence also supports the Hearing Examiner's finding. Id. In the present case, the Hearing Examiner heard testimony on the issue of what stage the announced RIF was in at the time of FOP's request to bargain and determined that the Union's request was premature. FOP disagrees with the Hearing Examiner's finding on this issue and asserts that DOC's duty to bargain began once FOP made a request. Based on our holding in Hoggard v. DCPS, we find that FOP's disagreement with the Hearing Examiner's finding does not constitute a valid exception, nor does it support a claim of reversible error. Id.

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blanket refusal to bargain and an unfair labor practice. We base this finding on the Hearing Examiner's determination that there was "no evidence as to the circumstances of Management's alleged refusal to bargain." ( R & R at p. 28). "The evidence is only that the Agency did not respond to the August 9 letter." The Hearing Examiner determined that DOC's actions in response to FOP's letter did *not* amount to a refusal to bargain. We also rely on the Hearing Examiner's finding that "there is no indication of what action, if any, the Union took to discover the reason for the non-response, other than to file this complaint." ( R & R at p. 29). While the Hearing Examiner does not point to any authority which requires the Union to investigate the reason for the Agency's non-response, the refusal to bargain has been clear in cases where the Board has found an unfair labor practice based on a refusal to bargain. See, Id.

In view of the above, we find that the Hearing Examiner applied the correct standard in determining that DOC 's failure to respond to FOP's letter did not amount to a refusal to bargain. Furthermore, the Board concludes that the Hearing Examiner applied the correct standard in determining that DOC did not commit an unfair labor practice by failing to respond. DCR 9633, Slip Op. No. 322 at p. 3 and 4, PERB Case No. 91-U-14 ( 1992). Therefore, we adopt the Hearing Examiner's finding that DOC did not commit an unfair labor practice by refusing to bargain over or submit documents related to the proposed September 30<sup>th</sup> RIF.

### **Failure to Bargain over Creation of New Criminal Investigator Positions**

*6. Whether DOC committed an unfair labor practice by failing to bargain over the impact and effects of creating new non-bargaining unit Criminal Investigator positions?*

FOP alleges that DOC committed an unfair labor practice by failing to engage in impact and effects bargaining over the creation of non-bargaining unit Criminal Investigator positions in the Internal Affairs Unit. In support of its allegation, FOP asserts that DOC had no authority to RIF Criminal Investigator positions in the Warrant Squad Division and then create identical non-bargaining unit Criminal Investigator positions in the Internal Affairs Unit<sup>31</sup>. In addition, FOP contends that mere consultation with the Union regarding the proposed change does not satisfy the Agency's duty to bargain over these issues.

DOC asserts that FOP never requested to engage in impact and effects bargaining over the

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<sup>31</sup>FOP claims that DOC created those Criminal Investigator positions to replace those positions that were slated for the September 30, 2000 RIF.

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creation of these positions. In addition, DOC denies that the new Criminal Investigator positions are identical to those that were slated for the September 30<sup>th</sup> RIF. Also, the Agency contends that the new Criminal Investigator positions were inappropriate for the bargaining unit, as a matter of law, because these employees would essentially be functioning as “confidential employees.”<sup>32</sup> In addition, DOC noted that the parties had discussed the new positions in their labor-management meetings. Moreover, DOC contends that bargaining unit members were given an opportunity to apply for those positions once they were advertised, but failed to do so.

The Hearing Examiner declined to decide the issue of whether the Agency committed an unfair labor practice by creating the new Criminal Investigator positions, noting that even if there were similarities between the positions, the issue would be a proper subject for a unit clarification petition, not an unfair labor practice complaint. In making this determination, he noted that there was no evidence in the record to suggest that the new positions were created to replace the RIF'd positions, particularly where the RIF was never implemented.<sup>33</sup>

We disagree with the Hearing Examiner's reasoning concerning this issue. The Board has exercised its jurisdiction to hear issues regarding the proper classification of positions as non-bargaining unit or bargaining unit in unfair labor practice proceedings. See, NAGE v. WASA, 47 DCR 7551, Slip Op. No. 635 at pgs. 8-13, PERB Case No. 99-U-04 (2000). Based on this precedent, the Board believes that Hearing Examiner could have exercised jurisdiction to determine whether DOC committed an unfair labor practice by creating new Criminal Investigator positions in the Internal Affairs Unit. See, NAGE v. WASA, 47 DCR 7551, Slip Op. No. 635 at pgs. 8-13, PERB Case No. 99-U-04 (2000). Also, the Board finds that Hearing Examiner could have exercised jurisdiction to determine whether those positions were, in fact, identical and whether anti-union animus motivated DOC to create the non-bargaining unit Criminal Investigator positions.

In the present case, the Union did not specifically allege that the Criminal Investigator

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<sup>32</sup>It is the Board's role to determine whether positions are to be classified as confidential as a matter of law. See, American Federation of Government Employees, Local 2725 and D.C. Department of Housing and Community Development, 45 DCR 2049, Slip Op. No. 532, 97-UC-01 (1998).

<sup>33</sup>In determining that no unfair labor practice had been committed, the Hearing Examiner repeated his finding that since the request to bargain over the September 30<sup>th</sup> RIF was premature, any request to bargain over the elimination of positions targeted for the announced RIF was also pre-mature. (R & R at 26). On this basis, the Hearing Examiner determined that the unfair labor practice charge concerning this allegation was also premature and not ripe for adjudication. As a result, he found that DOC did not commit an unfair labor practice concerning this allegation.

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positions currently occupied by bargaining unit members were being reclassified or taken out of the bargaining unit, as was alleged in NAGE v. WASA. Id. Instead, the Union alleges that the current bargaining unit positions were being eliminated through the September 30<sup>th</sup> RIF and then replaced by newly created non-bargaining unit positions that performed the same functions. However, the Union did not allege that anti-union animus was the basis for the Agency's decision to create the new non-bargaining unit Criminal Investigator positions. Because no such allegation was made, no analysis under the Wright-Line standard for discriminatory conduct is required.<sup>34</sup> Wright Line, Wright Line Division, 251 NLRB 1083. Had the anti-union animus allegation been made, the Board would have been required to determine whether DOC had a legitimate business reason for creating the Criminal Investigator positions in the Internal Affairs Unit and whether its given reason was pretextual or not. See, Id.

We concur with the Hearing Examiner's finding that the allegation is not ripe for adjudication in this unfair labor practice proceeding, but for different reasons than those expressed by the Hearing Examiner in his report. In his Report and Recommendation, the Hearing Examiner determined that the allegation concerning the RIF of the Warrant Squad positions was not ripe for adjudication because no administrative order had been issued and no retention roster had been created slating those positions for a RIF. Specifically, the Hearing Examiner credited the testimony of the Agency's witnesses and noted:

As the Agency's witnesses clarify, absent an administrative order for a RIF, there is no basis for creating a retention register<sup>35</sup>, and therefore, no basis for bargaining over the RIF. At such time as the Warrant Squad positions actually are

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<sup>34</sup>See, Wright Line, Wright Line Division, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced 662 F2d 899, 108 LRRM 2513 (CA 1, 1981), cert denied, 455 US 989, 109 LRRM 2779 (1982). The Wright Line standard was developed by the NLRB as a rule for allocating the burdens of proof to determine the existence of an unfair labor practice where mixed or dual motives exist, i.e., prohibited and non-prohibited, for actions taken by employers against employees. See Id., and Valerie A. Ware v. D. C. Consumer and Regulatory Affairs. 46 DCR 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1998), aff'd sub nom. Ware v. PERB MPA 93-33 (2000). The Board has adopted the Wright Line standard. The Board adopted the Wright Line standard in Charles Bagensose and Dr. Joseph Borowski v. District of Columbia Public Schools, 35 DCR 415, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34(1991).

<sup>35</sup>Also, we note that pursuant to section 2406.4 of the amended RIF rules contained in Chapter 24 of the District Personnel Manual: "The approval by the Mayor or the appropriate personnel authority of the administrative order or amendment thereof shall constitute an authority for the agency to conduct a reduction in force."

targeted for a RIF, the right to bargain upon request will attach. ( R & R at p. 28).

The Hearing Examiner did not cite any authority to support his proposition that the issue concerning the warrant squad positions would not be ripe until the positions are officially slated for RIF or were actually RIF'd. The Board is unaware of any such precedent. Rather, the Board finds that the issue concerning that warrant squad positions was not ripe for adjudication because no decision had been made to implement the September 30<sup>th</sup> RIF, generally, or to target the Criminal Investigator positions in the Warrant Squad division, specifically. See, FOP/MPD Labor Committee v. MPD, 47 DCR 1449, Slip Op. No. 607 at Footnote 27, PERB Case No. 99-U-44(2000). As noted earlier, the Board has held that an Agency is not obligated to bargain over a decision until it decides to implement the decision. Id. If it abandons or postpones implementation of the decision, it is still not obligated to bargain over the decision. See, Id.

In view of the above, we find that the Hearing Examiner's decision to dismiss this allegation is reasonable, supported by the record, and is consistent with applicable law. Also, since FOP's Exceptions did not allege that the Hearing Examiner committed reversible error with respect to the dismissal and resolution of this issue, we adopt the Hearing Examiner's finding on this issue.

**Failure to Bargain over new Working Conditions Agreement**

*7. Did DOC commit an unfair labor practice by refusing to bargain over a new working conditions collective bargaining agreement?*

FOP asserts that the Office of Labor Relations Collective Bargaining (OLRCB) violated D.C. Code §1-617.04(a)(5)(2001)<sup>36</sup> by insisting on negotiating ground rules prior to beginning negotiations on substantive contract provisions. FOP also contends that DOC's actions caused undue delay in the negotiation process. Finally, FOP contends that the Agency has taken the position that the arbitration provisions of the agreement are not operative.

DOC denies that it caused any undue delay in commencing negotiations with FOP. ( R & R at p.22). Furthermore, DOC argues that any delay which occurred was caused by the ongoing exchange of ground rules between the parties which began in September 2000 and ended in December of 2000 ( when the parties reached an agreement on the ground rules). ( R & R at p. 22). DOC adds that the process was also delayed by FOP's failure to complete the required designation of representative form, indicating who would serve as the Union's chief negotiator.<sup>37</sup> ( R& R at p.

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<sup>36</sup>Prior codification at D.C. Code §1-618.4(a)(5) (1981).

<sup>37</sup>In its brief, DOC claims that FOP did not submit the form until December 2000.

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22, Respondent's Brief at p.7). Furthermore, DOC asserts that once the form was submitted and the ground rules were in place, negotiations commenced promptly<sup>38</sup> and in an expedited manner.

The Hearing Examiner made a factual finding that the Agency did *not* cause any delay in the negotiation process. Specifically, he found that the evidence showed that both parties participated in the exchange of ground rules until the parties reached an agreement in December 2000. Thereafter, negotiations proceeded. As a result, the Hearing Examiner concluded that DOC did not violate its duty to bargain in good faith, as alleged by the Union. In light of the above, the Hearing Examiner recommends that this unfair labor practice allegation be dismissed.

FOP did not raise any Exceptions to the Hearing Examiner's finding on this issue.

Consistent with the above, we find that the Hearing Examiner's finding is supported by the record. Therefore, we adopt the Hearing Examiner's finding on this issue.

### Settlement Agreement

8. *Did DOC violate the duty to bargain in good faith by the manner in which it implemented a settlement agreement between the parties?*

FOP claims that DOC failed to bargain in good faith by refusing to generate, in a timely manner, the appropriate paperwork necessary "to effect" certain employee promotions which were negotiated by the parties. ( R & R at p. 24).

DOC argues that there was no time frame set to complete the terms of the settlement agreement. Furthermore, DOC contends that it did what it could to effectuate the terms of the settlement agreement. However, it asserts that any delay in the processing of the promotions was caused by the District of Columbia Office of Personnel (DCOP), a separate Agency over which DOC has no control.

In deciding that DOC did not cause the delay, the Hearing Examiner observed that there was no time limit set for implementing the promotions. In addition, he noted that there was cause for concern that the promotions were not effected in an earlier manner. However, FOP was not able to prove that DOC caused the delay,<sup>39</sup> nor did it present any evidence to rebut DOC's claim that DCOP

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<sup>38</sup>DOC asserts that negotiations began in January 2001 and were nearing completion at the time it submitted its brief. ( Respondent's Post-Hearing Brief at p. 17).

<sup>39</sup> The minutes of the September 21, 2000 Joint Labor-Management Meeting disclosed that the packages were sent to DCOP for processing sometime after the August 2000 Meeting.

caused the delay. As a result, the Hearing Examiner found that the record did not establish by a preponderance of the evidence that DOC caused the delay or otherwise committed an unfair labor practice.

FOP did not file Exceptions concerning this issue.

Consistent with the above, we find that the Hearing Examiner's finding is reasonable and supported by the record. Therefore, we adopt this finding.

### ***IX. General Exception***

As a general exception, FOP asserts that the Hearing Examiner erred by failing to consider all allegations made in its consolidated complaint.<sup>40</sup> Specifically, FOP argues that all allegations made in the consolidated complaint should have been considered regardless of whether they were addressed in FOP's Post-hearing brief. FOP bases this argument on its assertion that several of the issues were sufficiently addressed over the course of a full 3-day evidentiary hearing so as to allow the Hearing Examiner to make a reasoned and informed decision. Moreover, FOP believes that there was no need for further briefing<sup>41</sup>. As a result, FOP requests that the Board remand to the Hearing Examiner those allegations from its consolidated complaint which it claims the Hearing Examiner ignored.

While FOP may have concerns about whether or not all of its allegations were considered, we note that the Union fails to identify *any* specific allegations which it believes were not considered. Instead, FOP makes a general statement that "several allegations were sufficiently addressed at the hearing so as to allow the Hearing Examiner to make a reasoned and informed decision." (Exceptions at p. 2). Without more specificity from FOP, the Board cannot determine which specific allegations FOP contends are supported by the record. FOP also does not refer to any testimony from the hearing which it contends addresses allegations that were substantiated, but *not discussed by the Hearing Examiner*. In addition, the Board notes that the Hearing Examiner expressly states that "he considered evidence concerning all allegations made in the consolidated

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However, for reasons not disclosed on the record, the packages apparently languished at DCOP and the promotions were not effected until March 2001. ( R & R at p. 25).

<sup>40</sup>FOP bases the argument raised in this Exception on the Hearing Examiner's statement that FOP waived or abandoned some of its claims by not addressing them in its post-hearing brief. In addition, FOP takes exception to the Hearing Examiner's claim that he considered all charges in the consolidated complaint. (Exceptions at p. 2, R & R at pgs.4 and 36).

<sup>41</sup>In addition, FOP contends that its choice not to address all of the allegations set forth in its consolidated complaint does not constitute abandonment or waiver of those allegations.

complaint in light of the record, and concluded that the charges are unsubstantiated and therefore, without merit.”<sup>42</sup> ( R & R at p. 36). In light of the fact that FOP points to no evidence which disputes the Hearing Examiner’s statement, the Board finds that this general exception lacks merit and should be denied.

**XI. Recommendation**

Pursuant to D.C. Code §1-605.02 (3) (2001) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner’s findings and conclusion that DOC did *not* commit any of the alleged unfair labor practices described in the consolidated complaint.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The 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.

May 17, 2002

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<sup>42</sup> In the Board’s view, this statement refutes FOP’s assertion that the Hearing Examiner only considered allegations that were contained in the parties’ post-hearing briefs.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 00-U-36 and 00-U-40 was transmitted via Fax and/or U.S. Mail to the following parties on this 17<sup>th</sup> day of May 2002.

James F. Wallington, Esq.  
Baptiste & Wilder, P.C.  
1150 Connecticut Ave., N.W., Suite 500  
Washington, DC 20036

FAX & U.S. MAIL

Walter Wojcik, Esq.  
Labor Relations Specialist  
D.C. Office of Labor Relations  
and Collective Bargaining  
441 4<sup>th</sup> Street, N.W., Suite 820 North  
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copies:

Andrew Strongin, Esq.  
Hearing Examiner  
P.O. Box 5779  
Takoma Park, MD 20913

U.S. MAIL

Odie Washington, Director  
D.C. Department of Corrections  
1923 Vermont Avenue, N.W.  
Washington, D.C. 20001

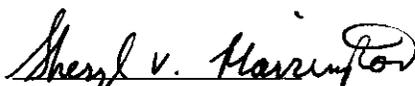
U.S. MAIL

Mary Leary, Esq.  
Director  
Office of Labor Relations  
& Collective Bargaining  
441 4<sup>th</sup> Street, N.W., Suite 820 North  
Washington, D.C. 20001

U.S. MAIL

William Dupree, Chairperson  
Fraternal Order of Police  
Department of Correction Labor Committee  
400 5<sup>th</sup> Street, N.W., Suite 100  
Washington, D.C. 20001

U.S. MAIL

  
Sheryl Harrington  
Secretary