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

In the Matter of:)	
)	
American Federation of Government Employees,)	
Locals 631, 383, 1000, 1403, 1975, 2725, 2741, 2978,)	
3444, and 3721.)	
)	
Complainants,)	
)	PERB Case No. 09-U-31
v.)	
)	Opinion No. 1528
District of Columbia Government, Office of Labor)	
Relations and Collective Bargaining, Department of Public)	
Works, Office of Property Management, Office of Zoning,)	
Office of Planning, Department of the Environment,)	
Department of Transportation, Department of Motor)	
Vehicles, Taxi Cab Commission, Department of Parks and)	
Recreation, Department of Employment Services,)	
Department of Health, Department of Fire and Medical)	
Services, Department of Consumer and Regulatory Affairs,)	
Department of Housing and Community Development,)	
Department of Youth Rehabilitation Services, Department)	
of Mental Health, Department of Human Services, Martin)	
Luther King Library, Department of Attorney General,)	
Metropolitan Police Department (Police Garage Division),)	
Office of the State Superintendent of Education)	
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DECISION AND ORDER

The instant unfair labor practice complaint was brought by ten locals of the American Federation of Government Employees¹ (“Unions” or “Complainants”) against the District of Columbia Government and twenty one of its agencies² (“Agencies” or “Respondents”). The

¹ Locals 631, 383, 1000, 1403, 1975, 2725, 2741, 2978, 3444, and 3721.

² Office of Labor Relations and Collective Bargaining, Department of Public Works, Office of Property Management, Office of Zoning, Office of Planning, Department of the Environment, Department of Transportation, Department of Motor Vehicles, Taxi Cab Commission, Department of Parks and Recreation, Department of Employment Services, Department of Health, Department of Fire and Medical Services, Department of Consumer

Unions allege that the Agencies refused to bargain over the development of a new annual electronic performance management system known as ePerformance and a drug and alcohol testing program. The Unions further allege that the Agencies failed to provide requested information regarding those two programs (“the Programs”). The case was referred to a hearing examiner, who held a hearing and issued a report and recommendation in which she found that the Agencies committed an unfair labor practice and recommended the imposition of certain remedies. The Agencies filed exceptions that raise the issue of whether D.C. Official Code § 1-613.53(b) relieves the Agencies of their obligation to engage in impact-and-effects bargaining concerning the ePerformance system. The Report and Recommendation, the Agencies’ exceptions, and the Unions’ opposition to the exceptions are before the Board for disposition.

I. Statement of the Case

A. Pleadings

The Unions filed their complaint (“Complaint”) April 29, 2009. The Agencies filed their answer (“Answer”) May 19, 2009. The Complaint alleges and the Answer admits that on March 10, 2009, the Unions submitted to Natasha Campbell of respondent Office of Labor Relations and Collective Bargaining (“OLRCB”) a letter dated March 6, 2009, requesting to bargain over the development of the Programs “to extent permitted by law”³ and that on March 17, 2009, the Unions sent Campbell a request for information.⁴

The Unions allege that they did not receive a written response to their request for bargaining nor to their request for information. The Unions “view this silence as failure to bargain” and view the failure to bargain and the failure to provide information to be a violation of the Comprehensive Merit Personnel Act (“CMPA”), specifically D.C. Official Code § 1-617.04 (a) (1), (2), (3), and (5).

To remedy the violation, the Unions request that the Board order the Agencies to (1) cease and desist from refusing to bargain, (2) negotiate with the Unions over the ePerformance evaluation system and resume using the previous evaluation system, (3) negotiate with the Unions over the drug and alcohol testing program, (4) make the Unions and their members whole for any wages or benefits lost as a result of the Agencies’ violations, (5) pay the Unions’ costs, and (6) post notices about the violations. Lastly, the Unions state that they “seek any additional remedy that the Public Employee Relations Board deems appropriate.”⁵ The Unions do not request an order related to the alleged failure to provide information.

and Regulatory Affairs, Department of Housing and Community Development, Department of Youth Rehabilitation Services, Department of Mental Health, Department of Human Services, Martin Luther King Library, Department of Attorney General, Metropolitan Police Department (Police Garage Division), Office of the State Superintendent of Education

³ Complaint ¶ 34, Ex. 1; Answer ¶ 34.

⁴ Complaint ¶ 35; Answer ¶ 35.

⁵ Complaint p. 9.

The Answer asserts that on May 4, 2009—subsequent to the filing of the Complaint—Campbell sent the Unions a written response to their requests. The Answer raised the affirmative defenses that the Programs were impermissible subjects of bargaining and that the bargaining request and the Complaint were untimely.

A hearing was held after which the parties submitted post-hearing briefs to the Hearing Examiner. The Agencies in their post-hearing brief acknowledged that when a subject is non-negotiable there normally remains a duty to bargain about the impact and effects of that subject, but they argued that in the case of performance evaluations the topic that is generally covered in negotiations on impact and effects—implementation—has been declared nonnegotiable by section 1-613.53(b) of the D.C. Official Code. The Agencies contended that drug and alcohol testing is a management right and contended that the Unions waived their right to bargain by unreasonably delaying their request to bargain for several months after the Programs were announced.

The Unions began their post-hearing brief with the principles that management must bargain over the impact and effects of, and procedures concerning, a management rights decision. Management has a duty to notify the union when a change in working conditions is implemented. In order to preserve its bargaining rights, the union must then demand to bargain over a change within a reasonable period of time. The Unions contended that a request to bargain is premature when the agency has not made its decision to implement a change or when the agency suspends implementation of a change. The Unions asserted that under those principles the request to bargain, as well as the Complaint, was timely in the present case. The Unions argued that section 1-613.53(b) is inapplicable to the implementation of the ePerformance system and that the Agencies had no authority for their assertion that drug and alcohol testing is an impermissible subject of bargaining. As the Programs are both negotiable, the Agencies' blanket refusal to bargain and to provide information violated the CMPA.

B. Hearing Examiner's Report and Recommendation

The Hearing Examiner issued a Report and Recommendation, which stated that the following facts are undisputed. Respondents are agencies of the District of Columbia Government. Complainants are locals of the American Federation of Government Employees and exclusive representatives of employees of the Respondents. The Respondents developed a new drug and alcohol testing program pursuant to title I of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, D.C. Official Code §§ 1-620.31-1-620.37. Initial ePerformance regulations were issued for comment in January 2008. The final regulations were published in June and August of 2009. The OLRCB arranged several informational meetings between labor and management concerning the Programs.⁶

⁶ Report & Recommendation p. 5.

By letter dated March 6, 2009, the Unions wrote to Natasha Campbell, the OLRCB Director, to request to bargain over the development of the Programs. They asked that the Programs not be implemented until bargaining was completed. On March 17, 2009, the Unions “submitted a request for information related to their March 6th bargaining request, to Ms. Campbell.”⁷

In a letter to the Unions dated May 4, 2009, Campbell replied that the development and implementation of the performance management system were nonnegotiable and that drug and alcohol testing was mandatory and therefore beyond the scope of bargaining. Campbell also took the position that the Unions had waived their right to bargain because the programs had been in effect “for some time.” She added that the Agencies were willing to meet to discuss issues surrounding ePerformance and that staff of the Department of Human Resources would be available to respond to questions regarding the administration of the Programs.⁸ The Hearing Examiner found that “Respondents refused to bargain with Complainants and refused to provide the requested documents.”⁹

The Hearing Examiner rejected the Agencies’ affirmative defenses that the Complaint was untimely and that the Unions had waived their right to bargain. The notices that the Agencies gave to the Unions about the Programs did not contain specific information regarding the intended changes or when the changes would be implemented. When the Unions became aware that the Programs were being implemented and that their members were being affected, they requested bargaining and information. Having received no response, the Unions timely filed their Complaint only a few weeks later. The Agencies’ subsequent refusal to negotiate or furnish requested documents led the Hearing Examiner to conclude that it would have been futile for the Unions to renew their requests.¹⁰

Concerning the merits, the Hearing Examiner determined that the Programs fall within management rights as defined in the CMPA¹¹ and thus the Respondents were not required to bargain over the decisions to implement the Programs.¹² Because the Programs impacted the terms and conditions of employment, the Agencies were required to bargain over the impact and effects of the Programs once the Unions requested that they do so.¹³ The Hearing Examiner concluded that the Unions proved the Agencies committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a) (5) “by refusing to engage in impact and effect[s] bargaining regarding the drug and alcohol testing policy and regarding ePerformance and its

⁷ *Id.*

⁸ Report & Recommendation p. 6.

⁹ *Id.*

¹⁰ *Id.* at 9-11.

¹¹ D.C. Official Code § 1-617.08(a).

¹² Report & Recommendation p. 11.

¹³ *Id.* at 11-12 (citing *Teamsters Local Unions No. 639 & 730 v. D.C. Pub. Sch.*, 38 D.C. Reg. 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991)).

implementation.”¹⁴ The Hearing Examiner did not make a determination regarding the Unions’ claim that the Agencies’ failure to provide requested information violated the CMPA.

The Hearing Examiner recommended that the Board order some but not all of the remedies requested by the Complainants. She recommended against ordering the Agencies to return to the *status quo ante* as the Programs had been in place for a period of time and there was insufficient evidence that bargaining would have altered the Programs or their implementation. She found that the request that the Unions be made whole for any wages or benefits lost as a result of the violations was overly broad and not supported by evidence. “While there was an allegation that a bargaining unit member lost employment as the result of a positive[,] but random, drug test, there was no evidence presented to support the conclusion that removal was improper or that there had been any other monetary loss suffered by Complainants.”¹⁵ The Hearing Examiner recommended that the Board order the Agencies to cease and desist from refusing to bargain, to negotiate with the Unions regarding the Programs, and to post notices of the violations. Finally, the Hearing Examiner stated:

With regard to the request for payment of costs, the Hearing Examiner concludes that costs should be awarded in this matter consistent with D.C. Code Section 1-618.13 and as analyzed by the Board in AFSCME District Council 20, Local 2776, AFL-CIO V. Department of Finance and Revenue, 37 DCR 5658, Slip Op. 245, PERB Case No. 89-U-02 (1990). Although not requested, the Hearing Examiner also recommends that this Board order Respondents to respond to the information request submitted by the Complainants.¹⁶

C. Exceptions

The Agencies filed exceptions in which they object that the Report and Recommendation ignored the basis for their position that they were under no duty to bargain over the impact and effects of the ePerformance system, i.e., their contention that section 1-613.53(b) prohibits impact-and-effects bargaining related to ePerformance. Section 1-613.53(b) provides, “Notwithstanding any other provision of law or of any collective bargaining agreement, the implementation of the performance management system established in this subchapter is a non-negotiable subject for collective bargaining.”

As they had in their post-hearing brief, the Agencies argue in their exceptions that implementation is the topic that impact-and-effects bargaining generally covers and that topic has been declared nonnegotiable when it comes to a performance management system

¹⁴ Report & Recommendation p. 12.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 14.

established in accordance with sections 1-613.51 *et seq.* Because ePerformance is such a system, section 1-613.53(b) prohibits bargaining over the processes and procedures of its implementation. “Since the process and procedures of implementation are the topics that would be discussed if impact and effects bargaining occurred, § 1-613.53(b) effectively prohibits such impact and effects bargaining.”¹⁷ The Agencies contend that the two decisions¹⁸ the Board has issued concerning section 1-613.53(b) are distinguishable from the present case.¹⁹

The Unions filed an opposition to the exceptions. The Unions note that section 1-613.53(b) is entitled “Transition provisions” and renders nonnegotiable “the performance management system established in this subchapter,” i.e., subchapter XIII-A of chapter VI of title 1 of the D.C. Official Code. The Unions argue that ePerformance is not the performance management system established in that subchapter. The Unions contend that section 1-613.53(b) gave management temporary authority to transition without bargaining to the new performance management system established in the subchapter. That temporary authority does not extend to “modifications or amendments to the performance management system *ad infinitum*.” Instead the temporary authority “has long since lapsed.”²⁰ Further, the Unions distinguish implementation from impact and effects, arguing that “[b]y their nature impact and effects are consequences that occur in response to the implementation of a change.”²¹ The Unions suggest that although the Hearing Examiner did not cite section 1-613.53(b), she “was aware of this dispute” and her Report and Recommendation reflects her “findings based on competing evidence.” As such findings do not provide a basis for attacking a Report and Recommendation, the Unions urge the Board to “reject the exceptions as mere disagreement with the R & R.”²²

III. Analysis

A. The Unions’ Request to Bargain

We first consider whether the Unions made a sufficient and timely request for bargaining. No exceptions were filed on this issue. “Whether exceptions have been filed or not, the Board will adopt the hearing examiner’s recommendation if it finds, upon full review of the record, that the hearing examiner’s ‘analysis, reasoning and conclusions’ are ‘rational and persuasive.’”²³

¹⁷ Exceptions pp. 5-6.

¹⁸ *AFGE, Local 2725 v. D.C. Dep’t of Consumer & Regulatory Affairs*, 59 D.C. Reg. 5347, Slip Op. No. 930, PERB Case No. 06-U-43 (2008); *AFGE, Local 1403 v. D.C. Office of the Corp. Counsel*, Slip Op. No. 709, PERB Case No. 03-N-02 (July 25, 2003).

¹⁹ Exceptions p. 6.

²⁰ Opp’n pp. 7-8.

²¹ Opp’n p. 6.

²² Opp’n p. 10.

²³ *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

1. Timeliness of the Request

The Agencies' response to the Unions' request for bargaining claimed that the Unions had waived their right to negotiate because the Programs had been in effect "for some time."²⁴ The Agencies argued that the Unions were notified about ePerformance at a November 2008 meeting and about drug and alcohol testing at a July 2008 meeting.²⁵ By waiting until March 2009 to request bargaining, the Agencies maintained, the Unions waived their right to bargain.²⁶

Whether that delay results in a waiver depends upon the adequacy of the notice the Unions were given concerning the contemplated changes in employment conditions. "Under the CMPA, the employer is required to provide the exclusive bargaining representative with adequate notice of a proposed change of a term or condition of employment and an adequate opportunity to bargain. The employer must then, upon request, bargain in good faith over the proposed change."²⁷ Adequate notice of a proposed change triggers a union's responsibility to request bargaining over the change.²⁸

A notice that lacks accurate information about the timing of a change is not adequate.²⁹ In addition, to be adequate, a notice must be sufficiently specific to provide the union with reasonable notice of the change.³⁰ The Hearing Examiner found that the notices in this case satisfied neither of those criteria:

The only communications issued by Respondents relating to ePerformance and the new drug/alcohol testing were invitations sent to Local representatives to attend several meetings during which, to some degree, these matters were discussed. The notices did not contain specific information regarding the intended changes or when the changes would be implemented.³¹

As the notices were inadequate, they did not trigger the Unions' responsibility to request bargaining. Moreover, the Hearing Examiner found that changes to the Programs continued to be made after the dates the Agencies claim the Programs took effect. While the changes were occurring, the Unions were promised additional meetings that were never held. When local presidents became aware that the Programs were being implemented and that their members

²⁴ Report & Recommendation p. 6.

²⁵ Agencies' Post-Hearing Brief p. 10.

²⁶ *Id.*

²⁷ *AFSCME Dist. Council 20 v. Gov't of D.C.*, 36 D.C. Reg. 5990, Slip Op. No. 223 at 2, PERB Case No. 87-U-07 (1989).

²⁸ *U.S. Dep't of Def. Commissary Agency Peterson Air Force Base v. AFGE Local 1857*, 61 F.L.R.A. 688, 692 (2006).

²⁹ *Nat'l Fed'n of Fed. Employees v. FLRA*, 369 F.3d 548, 552 (D.C. 2004).

³⁰ *Ogden Air Logistics Center Hill Air Force Base and AFGE AFL-CIO Local 1592*, 41 F.L.R.A. 690, 698 (1991).

³¹ Report & Recommendation p. 10.

were being affected, they requested bargaining and information.³² Therefore, the Board finds that the Hearing Examiner's conclusion that the Unions did not waive their right to request bargaining by failing to initiate their request in a timely manner is reasonable, persuasive, supported by the record, and consistent with Board precedent.

2. Sufficiency of the Request

The Board has consistently held that a union's request to bargain need not specify that it was a request to bargain over impact and effects. In the leading case on that point, *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital* ("*International Brotherhood*"),³³ D.C. General Hospital informed the union of its intention to require members of the union to transport patients from the emergency room to the emergency psychiatric receiving department. The union "sent the Hospital a demand to bargain over this proposed change in policy."³⁴ The parties had a meeting, but "[t]he Hospital did not recognize its obligation to bargain over this issue and termed the [union]'s presence as for the purpose of input only."³⁵ The Board found that the decision in question was a management right. Nonetheless, the hospital had a duty to bargain upon request concerning the impact and effects of the decision. The Board held that the union had sufficiently requested impact-and-effects bargaining, even though it had not done so by name:

Any general request to bargain over a matter implicitly encompasses all aspects of that matter, including the impact and effects of a management decision that is otherwise not bargainable. Notwithstanding our finding that no duty to bargain exists with respect to DCGH's decision, DCGH's blanket refusal, in response to IBPO's request to bargain foreclosed the opportunity for bargaining of any nature to occur, including the limited duty to bargain over that aspect of DCGH's non-bargainable management decision concerning its effects and impact.³⁶

The Board has cited and reaffirmed this holding of *International Brotherhood* many times.³⁷ For example, in *NAGE, Local R3-06 v. D.C. Water and Sewer Authority*,³⁸ the Board

³² *Id.*

³³ 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992).

³⁴ *Id.* at 2.

³⁵ *Id.*

³⁶ *Id.* at 3. While not requiring a specific request for impact-and-effects bargaining, the Board added that the better practice in the interest of collective bargaining is for a union to follow a refusal to bargain over any aspect of management right with "a second request to bargain with respect to the specific effects and impact of that management decision on bargaining-unit employees' terms and conditions of employment." *Id.* at 4.

³⁷ *AFGE Local 383 v. D.C. Dep't of Youth Rehab. Servs.*, 61 D.C. Reg. 1544, Slip Op. No. 1449 at p. 12, PERB Case No. 13-U-06 (2014); *AFSCME, Dist. Council 20, Local 2921 v. D.C. Pub. Sch.*, 60 D.C. Reg. 15987, Slip Op. No. 1424 at p. 4, PERB Case No. 10-U-49 (2013); *AFGE, Local 631 v. D.C. Dep't of Gen. Servs.*, 60 D.C. Reg. 12068, Slip Op. No. 1401 at p. 51, PERB Case No. 13-U-23 (2013); *AFSCME, Dist. Council 20, Local 2921 v. D.C.*

considered a request for bargaining in which NAGE “demanded to bargain over the implementation of new performance rating procedures and the plan to reinterview employees of the WASA-CFO’s office for their positions.”³⁹ The general manager of the agency replied that by law those employees were employed at will, and the agency went forward with the changes.⁴⁰ The hearing examiner found that “[n]otwithstanding the lack of clarity in NAGE’s demands for negotiations over the reorganization, . . . under Board precedent, even a broad, general request for bargaining ‘implicitly encompasses all aspects of that matter, including the impact and effect of a management decision that is otherwise not bargainable.’”⁴¹ The Board adopted that finding as well as the hearing examiner’s conclusion that NAGE’s request was sufficient and timely so as to trigger the agency’s duty to bargain over the impact and effects of its decision.⁴²

In *F.O.P./Department of Corrections Labor Committee v. D.C. Department of Corrections*,⁴³ the Board paraphrased the holding of *International Brotherhood* as being “that an unfair labor practice has *not* been committed until there has been a general request to bargain and a ‘blanket’ refusal to bargain.”⁴⁴ This paraphrase is reiterated in four recent cases.⁴⁵

The Board has not issued any decisions to the contrary, although it is possible that the Board’s decision in Slip Op. No. 1026, PERB Case No. 07-U-24,⁴⁶ could be misinterpreted. In that case the Board accepted the hearing examiner’s finding that “FOP did not request impact and effect bargaining.”⁴⁷ But in the same paragraph the Board states that “the Hearing Examiner found no evidence that FOP requested to bargain over an alleged change in policy.” Similarly, in Slip Op. No. 1524, PERB Case No. 06-U-49,⁴⁸ the hearing examiner said that the union did not request impact-and-effects bargaining, but the union’s representative admitted that he did not request bargaining.⁴⁹ Thus, the missing element in both of those unfair labor practice claims was a request to bargain and not a specification of the subject of impact and effects in the request.

Pub. Sch., 60 D.C. Reg. 2602, Slip Op. No. 1363 at pp. 6, 8, PERB Case No. 10-U-49 (2013); *NAGE, Local R3-06 v. D.C. Water Auth.*, 47 D.C. Reg. 7551, Slip Op. No. 635 at p. 6, PERB Case No. 99-U-04 (2000).

³⁸ 47 D.C. Reg. 7551, Slip Op. No. 635, PERB Case No. 99-U-04 (2000).

³⁹ *Id.* at 3.

⁴⁰ *Id.*

⁴¹ *Id.* at 6 (quoting *Int’l Bhd. of Police Officers, Local 446 v. D.C. Gen. Hosp.*, 39 D.C. Reg. 9633, Slip Op. No. 322, at pp. 3-4, PERB Case No. 91-U-14 (1992)).

⁴² *Id.* at 6, 8.

⁴³ 49 D.C. Reg. 8937, Slip Op. No. 679, PERB Case Nos. 00-U-36 and 00-U-40 (2002).

⁴⁴ *Id.* at 16.

⁴⁵ *AFSCME, Dist. Council 20 & Local 2921 v. Dep’t of Pub. Works*, 62 DC Reg. 5925, Slip Op. No. 1514 at p.4, PERB Case No. 14-U-03 (2015); *AFGE Local 383 v. D.C. Dep’t of Youth Rehab. Servs.*, 61 D.C. Reg. 1544, Slip Op. No. 1449 at p. 12, PERB Case No. 13-U-06 (2014); *AFGE, Local 631 v. D.C. Dep’t of Gen. Servs.*, 60 D.C. Reg. 12068, Slip Op. No. 1401 at p. 5, 13-U-23 (2013); *AFSCME, Dist. Council 20, Local 2921 v. D.C. Pub. Sch.*, 60 D.C. Reg. 2602, Slip Op. No. 1363 at p. 6, 10-U-49 (2013).

⁴⁶ *F.O.P./Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 59 D.C. Reg. 9742, Slip Op. No. 1026, PERB Case No. 07-U-24 (2010).

⁴⁷ *Id.* at 12.

⁴⁸ *F.O.P./Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, Slip Op. No. 1524, PERB Case No. 06-U-49 (May 28, 2015).

⁴⁹ *Id.* at 2, 3.

The Board made clear that the latter is unnecessary in two cases in which it reversed hearing examiners who insisted upon a clear or an unambiguous request for impact-and-effects bargaining. In *AFSCME, District Council 20, Local 2921 v. D.C. Public Schools*,⁵⁰ the hearing examiner claimed that “PERB’s precedent requires a clear and timely demand to bargain I[mpact] [and] E[ffects] issues from the union followed by a refusal to bargain from the agency.”⁵¹ The hearing examiner found that the record did not establish that the union made a clear and timely demand, and “[i]n the absence of a clear and time[ly] demand to bargain I[mpact] [and] E[ffects] issues,” the hearing examiner found no unfair labor practice. The union excepted to the “clarity” requirement, contending that “a demand for impact and effects bargaining does not require the use of the specific term ‘impact and effects.’”⁵² The Board agreed:

The Hearing Examiner’s conclusion that “PERB precedent requires a clear and timely demand to bargain impact and effects issues” is incorrect. See *International Brotherhood of Police Officers, Local 446 v. District of Columbia General Hospital*, 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992). The Hearing Examiner’s additional element that a timely request for impact and effects bargaining must be “clear” is not established in Board precedent.⁵³

The Board remanded the case with an instruction to the hearing examiner to apply the correct standard in determining whether the union made a proper and timely request to bargain. On remand, the hearing examiner found that the union had made no request at all.⁵⁴

The Board corrected the same error in the recent case of *AFSCME, District Council 20 and Local 2921 v. Department of Public Works*,⁵⁵ Despite the Board’s holding in the preceding case, the hearing examiner in *Department of Public Works* said that “PERB precedent requires a clear and timely demand to bargain impact and effects”⁵⁶ and found that the agency did not have a duty to engage in impact-and-effects bargaining because the union had not made an “unambiguous request to bargain impact and effects of the productivity goals.”⁵⁷ The Board again ruled that the proposition that a request for impact-and-effects bargaining must be clear is incorrect and not established in the Board’s precedent.⁵⁸

⁵⁰ 60 D.C. Reg. 2602, Slip Op. No. 1363, PERB Case No. 10-U-49 (2013).

⁵¹ *Id.* at 7.

⁵² *Id.*

⁵³ *Id.* at 8.

⁵⁴ *AFSCME, Dist. Council 20, Local 2921 v. D.C. Pub. Sch.*, 60 D.C. Reg. 15987, Slip Op. No. 1424 at p. 3, PERB Case No. 10-U-49 (2013).

⁵⁵ 62 DC Reg. 5925, Slip Op. No. 1514, PERB Case No. 14-U-03 (2015).

⁵⁶ *Id.* at 4.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 4.

In the instant case, the elements of a general request and a blanket denial are clearly present. The Unions' request expressly extends to all collective bargaining permissible by law:

This is a request to bargain over the *development* of the new ePerformance system, to the extent permissible by law. In addition, we are also requesting to bargain over the drug and alcohol testing program implemented pursuant to Title 1 of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004, to the extent permissible by law.⁵⁹

The Agencies' blanket refusal of the request left no exception for impact-and-effects bargaining. Their letter stated that the "development and implementation of the performance management system are non-negotiable subjects for bargaining" and that the drug and alcohol testing was mandatory and therefore "removed from the ambit of bargaining." The Agencies also claimed that the Unions had waived their right to negotiate.⁶⁰ The Hearing Examiner found that "Respondents refused to bargain with Complainants. . . ."⁶¹ In view of the Unions' general and comprehensive request and the Agencies' blanket refusal, the Unions' request was sufficient to encompass impact-and-effects bargaining.

B. Negotiability of the Programs

1. The ePerformance System

As the Agencies point out in their exceptions, the Hearing Examiner did not address section 1-613.53(b) or the Agencies' contention that it releases them from a duty to negotiate regarding the impact or effects of the ePerformance system. Contrary to the Unions' assertion that the Agencies' exceptions to the Report and Recommendation constitute mere disagreement with evidentiary findings, the exceptions do not turn on disputes of fact but rather on an issue of law, the interpretation of section 1-613.53(b). Therefore, pursuant to Rule 520.10 this matter can appropriately be decided on the pleadings.⁶²

The Unions maintain that section 1-613.53(b) has no applicability to the ePerformance system. It is unnecessary to decide that issue because this case is only about impact-and-effects bargaining and section 1-613.53(b) is not a bar to impact-and-effects bargaining. The Agencies argue that section 1-613.53(b) makes the impact and effects of the ePerformance system nonnegotiable because it makes the implementation of a performance management system nonnegotiable. In this argument, the Agencies equate implementation, as that word is used in

⁵⁹ Complaint Ex. 1.

⁶⁰ Report & Recommendation p. 6.

⁶¹ *Id.*

⁶² See *Teamsters Local Union No. 639 and D.C. Pub. Sch.*, 59 D.C. Reg. 6162, Slip Op. No. 1021 at p. 6, PERB Case No. 08-U-42 (2010).

section 1-613.53(b), with impact and effects. The Board, however, treats the two distinctly. Implementation of a management rights decision has impacts and effects, and the impact and effects of implementation are negotiable upon request.⁶³ The Board has applied section 1-613.53(b) in conformity with this distinction. In *American Federation of Government Employees, Local 631 v. Government of the District of Columbia*,⁶⁴ a case decided after the parties filed their briefs in the present case, the Board held that the respondent agencies were required to bargain over the impact and effects of the implementation of a performance evaluation system “notwithstanding its designation as a non-negotiable subject of collective bargaining.”⁶⁵

The Hearing Examiner did not observe the distinction between implementation and the impact and effects of implementation. She stated that the Agencies were required “to bargain over the impact and effects of . . . ePerformance and its implementation”⁶⁶ and that the Agencies committed an unfair labor practice “by refusing to engage in impact and effect bargaining . . . regarding ePerformance and its implementation.”⁶⁷ In view of the law discussed above, the pleadings, and the record, the Board finds that the Agencies were required to bargain over the impact and effects of ePerformance and that the Agencies committed an unfair labor practice by refusing to engage in impact-and-effects bargaining regarding ePerformance.

2. Drug and Alcohol Testing

Although neither party filed exceptions to the Hearing Examiner’s finding that the Agencies committed an unfair labor practice by failure to bargain regarding the impact and effects of the new drug and alcohol testing policy, the Board has reviewed the findings and conclusions of the Hearing Examiner. The Board finds that the record supports the Hearing Examiner’s finding that the Agencies were required to bargain over the impact and effects of the new drug and alcohol testing policy and that the Agencies committed an unfair labor practice by refusing to engage in impact-and-effects bargaining regarding that policy.

C. Request for Information

An agency is obligated to furnish requested information that is both relevant and necessary to the union’s role in the processing of a grievance, an arbitration proceeding, or collective bargaining. A failure to do so is an unfair labor practice.⁶⁸ The Hearing Examiner

⁶³ *F.O.P./Metro. Police Dep’t Labor Comm. v. D.C. Metro. Police Dep’t*, 59 D.C. Reg. 9742, Slip Op. No. 1026 at 12, PERB Case No. 07-U-24 (2010).

⁶⁴ 59 D.C. Reg. 15175, Slip Op. 1334 at pp. 2-3, PERB Case No. 09-U-18 (2012).

⁶⁵ *Id.* at 3. Cf. *AFSCME, Dist. Council 20 v. D.C. Pub. Sch.*, 60 D.C. Reg. 2602, Slip Op. No. 1363 at p. 6, PERB Case No. 10-U-49 (2013) (finding impact-and-effects bargaining required notwithstanding the nonnegotiability of the evaluation process and the instruments for evaluating D.C. Public Schools employees).

⁶⁶ Report & Recommendation pp. 11-12.

⁶⁷ *Id.* at 12.

⁶⁸ *D.C. Nurses Ass’n v. D.C. Dep’t of Mental Health*, 59 D.C. Reg. 15187, Slip Op. No. 1336 at p. 3, PERB Case No. 09-U-07 (2012).

found that the Agency refused to provide documents requested by the Unions.⁶⁹ But the Hearing Examiner did not find, nor did the Unions allege, that the documents were relevant and necessary to the Unions' role in a grievance, an arbitration, or collective bargaining, and the Hearing Examiner did not find that the Agencies committed an unfair labor practice by failing to provide the information. Despite the absence of those findings and allegations and the absence of a request from the Unions for an order concerning the information request, the Hearing Examiner recommended that the Board order the Agencies to respond to the information request.⁷⁰

An analogous unfair labor practice complaint filed by the Fraternal Order of Police alleged that the Metropolitan Police Department had changed its policy on the use of take-home vehicles.⁷¹ The complaint further alleged that the Fraternal Order of Police requested information regarding the Department's decision to change its policy but did not receive the requested information. The complaint asserted that "[t]he Department committed an Unfair Labor Practice by refusing to provide relevant and necessary information regarding the Department's change in its take-home vehicle policy."⁷² The Department did not deny the factual allegations, but it denied that it had committed an unfair labor practice and accordingly moved to dismiss the complaint. In granting the Department's motion to dismiss, the Board stated, "[T]he Complaint merely asserts that Respondent's actions violate the CMPA by asserting that Respondent failed to provide the requested information. FOP has not alleged facts that it sought information relevant and necessary to the Union's collective bargaining duties."⁷³

The Unions' Complaint in the present case does not even allege a conclusion that the requested information is relevant and necessary to its collective bargaining duties, let alone "facts which if proven would establish" that conclusion.⁷⁴ The Board will not supply both a claim and a remedy when the Complaint neither pleads the former nor requests the latter.

D. Remedies for Failure to Bargain upon Request

We find that the Hearing Examiner's denial of a *status quo ante* remedy and an award of monetary damages for the Agencies' failure to bargain upon request is reasonable and consistent with Board precedent.

The Hearing Examiner recommended that costs should be awarded and cited the leading case of *AFSMCE District Council 20 v. Department of Finance and Revenue*.⁷⁵ But the Hearing Examiner did not indicate that any of the interest of justice criteria listed in that case was present or that some other characteristic of the instant case warranted ordering the Agencies to pay the

⁶⁹ Report & Recommendation p. 6.

⁷⁰ *Id.* at 14.

⁷¹ *F.O.P./Metro. Police Dep't Labor Comm. v. D.C Metro. Police Dep't Labor Comm.*, 59 D.C. Reg. 6781, Slip Op. No. 1131 at p. 2, PERB Case No. 09-U-59

⁷² *Id.* at 3.

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 5.

⁷⁵ 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

Unions' costs.⁷⁶ A review of the interest of justice criteria listed in *Department of Finance and Revenue* reveals that they are not present. Given that at the time this case was litigated there were no cases on the question of whether section 1-613.53(b) precluded impact-and-effects bargaining on a performance evaluation system, it cannot be said that the Agencies' position was wholly without merit.⁷⁷ Further, nothing in the record suggests that the actions of the Agencies were undertaken in bad faith or that they had the foreseeable result of undermining the Unions among the employees they represent.

With the preceding exceptions, we adopt the recommended remedies of the Hearing Examiner as set forth below in the order.

⁷⁶ See *supra* p. 5.

⁷⁷ See *Teamsters Local Union No. 639 v. D.C. Pub. Sch.*, 59 D.C. Reg. 6162, Slip Op. No. 1021 at p. 11, PERB Case No. 08-U-42 (2010); *Barganier v. F.O.P./Dep't of Corrs. Labor Comm.*, 43 D.C. Reg. 2949, Slip Op. No. 464 at p. 5 n.4, PERB Case No. 95-S-02 (1996).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Agencies shall cease and desist from refusing to bargain, upon request, about the procedures for and the impact and effects of the ePerformance system and the drug and alcohol testing program.
2. The Agencies shall negotiate in good faith with the Unions, upon request, with respect to procedures for and the impact and effects of the ePerformance system and the drug and alcohol testing program.
3. Each of the Agencies shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The notice shall remain posted for thirty (30) consecutive days.
4. The Agencies shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the notices have been posted accordingly.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

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

Washington, D.C.

June 25, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served upon the following parties by File and ServeXpress on this the 26th day of June 2015.

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/s/ Sheryl V. Harrington
Sheryl V. Harrington
Secretary