Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Doctors' Council of the District of Columbia,	)	
Complainant,	)	PERB Case No. 11-U-22
v.	)	Opinion No. 1208
District of Columbia Department of Youth Rehabilitation Services,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case

Doctor's Council of the District of Columbia ("DCDC," "Union," or "Complainant") filed an Unfair Labor Complaint ("Complaint") against the District of Columbia Government, Department of Youth Services ("DYRS," "Agency," or "Respondent"). The Complaint alleges that the Agency violated D.C. Code §§ 1-617.04(a)(1) and (5) by: (1) "failing to engage in good faith impact and effects bargaining;" "failing and refusing to provide information necessary and relevant to the Union's role as exclusive bargaining representatives;"(2) "eliminating three (3) bargaining unit positions and employees, removing the work of bargaining unit positions and bargaining unit employees, and transferring the work to non-bargaining unit employees including an MSS-Supervisory Medical Officer and other non-bargaining unit employees and contracts;" and (3) "refusing to select an arbitrator on a timely filed demand for [a] grievance arbitration." (Complaint at pg. 9).

DYRS filed "Agency Answer To The Unfair Labor Practice Complaint" ("Answer"), denying the allegations and requesting that the Complaint be dismissed.

II. Discussion

DCDC is the certified exclusive bargaining representative of dentists, podiatrists, and medical officers employed by agencies through the District of Columbia, including the Respondent. See, Complaint at pg. 1. In July 2010, Dean Aqui of the Office of Labor Relations and Collective Bargaining ("OLRCB") sent DCDC a notice that a reduction-in-force ("RIF") was being contemplated at DYRS for efficiency and budgetary reasons. See, Complaint at pg. 2. The Union then requested a meeting with DYRS. See, Complaint at pg. 2. On August 11, 2011, the Union and DYRS met. See, Complaint at pg. 2. At the meeting, DYRS informed the Union of a plan to replace bargaining unit medical officers with a new non-bargaining unit supervisory medical officer-MSS. See, Complaint at pg. 3. The Union alleges that it was also told that contractors would be performing some of the services performed by the bargaining unit officers. See, Complaint at pg. 3. The Respondent denies the allegation. See, Answer at pg. 3. During the meeting, the Union requested information including, but not lot limited to, a copy of the job description for the supervisory medical officer-MSS and any studies, reports or analyses management relied upon in planning the RIF, particularly a report by Dr. Ronald Shansky. See, Complaint at pg. 3. DYRS alleges that it supplied the Shansky report upon request. See, Answer at pg. 4.

On August 18, 2010, the Union submitted a written information request to DYRS. The Union submitted subsequent requests for information, both orally and in writing. See, Complaint at pg. 3. On August 13, 2010, and August 19, 2010, DYRS submitted some, but not all, of the information requested, including a letter titled "Report/Recommendations from Dr. Shansky." See, Complaint at pg. 3.

On August 20, 2010, Aqui gave Union's counsel a copy of an Administrative Order that authorized the RIF of the bargaining unit medical officers. In addition, Aqui gave DYRS' Interim Director the "Request for Approval of Reduction in Force in DYRS," dated August 13, 2010, which referred to Dr. Shansky's report on reconfiguring DYRS' medical staff resources, as well as retention registers for the RIF. See, Complaint at pg. 3. The Union alleges that on August 20, 2010, Union counsel submitted another request for Dr. Shansky's complete report, as well as any other written product from Dr. Shansky. See, Complaint at pg. 4. DYRS alleges that it had already provided a copy of Shansky's report and that it asked the Union to demonstrate how a copy of the report was relevant to the RIF. See, Answer at pg. 4.

On August 31, 2010, the Union again requested the job description on the Supervisory Medical Officer-MSS position that had previously been requested during the August 11, 2010, meeting and the August 18, 2010, written information request. See, Complaint at pg. 4.

On September 3, 2010, Aqui sent Union counsel copies of letters sent to each of the bargaining unit medical officers, notifying each of the RIF effective date of September 24, 2010. The Union had not previously been informed of the effective date of the RIF. See, Complaint at pg. 4.

On September 7, 2010, DCDC Labor Representative Dixon wrote to the DYRS Interim Director and requested a meeting to discuss a statement made by the Interim Director that there would not be any major changes and no one will lose their job. See, Complaint at pg. 4. Aqui then notified Dixon that the Interim Director had been advised not to meet with him, and the meeting did not occur. See, Complaint at pg. 4. DYRS asserts that Aqui is the Agency's representative concerning RIFs and that the Union and

Aqui were in the process of impact and effect bargaining on September 7, 2010. The Respondent alleges that the Union's representative needed to meet with Mr. Aqui regarding the RIF. See, Answer at pg. 5.

On September 16, 2010, the Union informed Aqui that if the RIF were to go forward, the outstanding information needed to be provided and the Union wanted to meet sometime during the week of September 20, 2010. See, Complaint at pgs. 4-5.

On September 17, 2010, the Union filed a grievance with DYRS concerning: (1) the RIF; (2) the elimination of bargaining unit positions; (3) alleged contracting out of bargaining unit work, the creation and filling of the new medical officer position to perform work done by bargaining unit employees; (4) DYRS' failure to follow the parties' CBA and applicable regulations; and (5) deficiencies in the Agency's plan concerning the care of youth. See, Complaint at pg. 5. The grievance also alleged "[(1)] violation of the Non-Compensation Agreement Art. 2 (Recognition), [(2)] Art. 5-Sec. A and [(3)] Sec. B (Management Rights), Art. 29 (Reduction-in-Force) and Art. 30 (Contracting Out)." (Complaint at pg. 5). In addition, the Union alleges that "[t]he provisions of Art. 29 on Reduction-in-Force…were negotiated by the parties in the Fall of 2005 after enactment of the Abolishment Act," and "[t]he provisions were specifically negotiated to address matters that remained negotiable under the Abolishment Act." (Complaint at pg. 5). DYRS admits Article 20 of the parties' CBA was negotiated in October of 2005, but denies the rest of the Union's allegations. See, Answer at pg. 5.

On October 12, 2010, DCDC and DYRS met. The Union again requested the still outstanding information. See, Complaint at pg. 5. DYRS alleges that it provided all outstanding information on October 13, 2010, and on subsequent dates. See, Answer at pg. 6.

DCDC continued to ask DYRS to reconsider eliminating the bargaining unit positions. DCDC also made several impact and effect ("I & E") proposals on October 12, 2010, including:

- Allow the bargaining unit member who was on administrative leave to retire; and retain one or both of other two bargaining unit medical officers in full or part-time capacity.

- Provide reimbursement up to $5,000 per doctor for purposes of continuing medical education courses and/or for the study course for board certification examination and/or for the fee for a board certification examination/application in order to improve prospects for future employment.

- Provide services of a job placement specialist with knowledge of physician employment opportunities.

- Explore possibility of preferential hiring by federal agencies which employ physicians- e.g., OPM, Veterans Administration, National Institutes of Health, and Military.

(Complaint at pgs. 5-6). Management did not respond to any of the proposals. See, Complaint at pg. 6.

On October 22, 2010, the RIF occurred, eliminating the bargaining unit medical officer positions. See, Complaint at pg. 6. On October 25, DYRS hired Dr. Sami Altaf to fill the Supervisory Medical Officer-MSS position. See, Complaint at pg. 6; see also, Answer at pg. 6. Dr. Altaf performs responsibilities, duties, and functions that were formerly performed by the bargaining unit medical officers. See, Complaint at pg. 6. In addition, DCDC alleges that DYRS contracted and/or hired additional positions to perform some of the functions previously conducted by the bargaining unit medical officers. See, Complaint at pg. 6. The Agency denies the allegation. See, Answer at pg. 6. The Union also alleges that the RIF occurred prior to the completion of I&E bargaining. See, Complaint at pg. 6. DCDC denies the allegation. See, Answer at pg. 6.

The Union alleges:

> [t]he Employer provided some additional information- as late as November 15, 2010 (after the October 22, 2010 effective date of the RIF). However, the Employer never provided at least the following:
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> a) The Position Description for the MSS-Supervisory Medical Officer Position.
>
> b) Any Analysis (whatever titled) prepared for the Supervisory M.O. position (e.g., job analysis documentation, factor analysis of elements of job, analysis underlying determination the position is MSS, analysis of grade level).
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> c) The rest of the February 7, 2010 "Shansky report" and any other written product from Dr. Shansky re: medical services at DYRS.
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> d) A copy of the contract (and/or other document) for the Shansky report (including scope of work/description of requested work).
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> e) The portions of the contracts (or Human Care Agreements) between DYRS and the entities contracted to provide medical services to DYRS (i.e., Stat Medical and Magnificus) which describe the scope of services to be provided to DYRS by the contracts). (sic)
>
> f) Analyses of the cost/budget implications of the new medical model.
>
> g) Memo from Andrea Weisman, Chief, Office of Health Services, DYRS Health Services Administration, to the Interim Director of DYRS sent to the D.C. Council [Committee on Human Services] regarding the decision to RIF the current physicians at DYRS facilities.

(Complaint at pg. 7). DYRS asserts that Mr. Aqui provided relevant information concerning the RIF to the Union as it became available. In addition, DYRS alleges that Mr. Aqui informed the Union that some of the information it had requested was irrelevant to the RIF. The Agency denies the rest of the allegation. See, Answer at pg. 6.

OLRCB represents the Agency in the arbitration stages of grievances. See, Complaint at pg. 7. On October 20, 2010, the Union notified OLRCB, pursuant to Art. 11, Sec. B, Step 4 of the parties' Non-Compensation Agreement, that it intended to move the grievance to arbitration. Union Representative Dixon asked OLRCB Director Campbell to agree to an expedited arbitration and to hold the RIF in abeyance into the arbitration had been resolved. The Director refused. See, Complaint at pg. 8.

On October 29, 2010, the Union filed a Demand for Arbitration with the Federal Mediation Conciliation Services (FMCS), pursuant to the parties' CBA. FMCS sent the parties a list of arbitrators, dated November 2, 2010. See, Complaint at pg. 8. On November 9, 2010, OLRCB Director Campbell requested Union counsel contact Jonathan O'Neill to select an arbitrator from the list. Mr. O'Neill then directed Union counsel to OLRCB attorney Langford for that purpose. See, Complaint at pg. 8. The Union alleges that Union counsel's attempts to set up a time with Mr. Langford to choose an arbitrator were unsuccessful. The Union asserts Mr. Langford did not respond until November 30, 2010, and the response was an email stating OLRCB did not believe the grievance was arbitrable and it had so informed FMCS. See, Complaint at pg. 8. The Agency admits that Langford sent Union counsel an email stating that the RIF was not arbitrable, but it denies the rest of the allegation. See, Answer at pg. 6.

On November 30, 2010, Union counsel requested a copy of Mr. Langford's communication with FMCS. On December 3, 2010, Union counsel received a copy of Mr. Langford's November 23, 2010, communication to FMCS, stating the RIF was not arbitrable. To support his contention, Langford relied on provisions of the Abolishment Act, D.C. Code Sec. 1-624.08(j). Langford's letter further said DYRS would lose its neutrality and become a union advocate if it were forced to arbitrate and requested FMCS to void the list of arbitrators and give the union due notice. See, Complaint at pg. 8. The Union alleges that FMCS then put the matter on hold. See, Complaint at pg. 8. The Agency denies that the matter was put on hold. See, Answer at pg. 7.

Based on the above allegations, the Union contends the Agency has violated CMPA, D.C. Code Secs. 1-617.04(a)(1) and (a)(5):

- By failing to engage in good faith Impact and Effects bargaining in conjunction with the Reduction-In-Force effective October 22, 2010;
- By failing and refusing to provide information necessary and relevant to the Union's role as exclusive bargaining representative;
- By eliminating three (3) bargaining unit positions and employees, removing the work of bargaining unit positions and bargaining unit employees, and transferring the work to non-bargaining unit employees including an MSS- Supervisory Medical Officer and other non-bargaining unit employees and contractors; and
- By refusing to select an arbitrator on a timely filed demand for grievance arbitration in FMCS Case #111102-00414-A (Doctor's Council and Department of Youth Rehabilitation Services).

(Complaint at pg. 9). The Agency denies the charges. See, Answer at pg. 7.

> In addition, DCDC asserts the following affirmative defenses:
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> D.C. Official Code, § 1-617.08 grants the Respondent the sole right to "determine the mission of the agency...tour of duty...and to take whatever actions may be necessary to carry out the mission of the District government in emergency situations..." These rights cannot be waived or relinquished...The PERB does not have jurisdiction over the Respondent's exercise of prescribed statutory rights.
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> In the instant case, Respondent made a decision to realign its workforce in the Health Services Administration. As a result of the realignment, certain bargaining unit member's positions were subject to a RIF. Respondent met with the Complainant for impact and effects bargaining upon the Union's request. Complainant contends that Respondent failed to bargain and provide requested information. Complainant seeks to have, *inter alia*, Respondent rescind the RIF.
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> Even assuming that Respondent did not bargain in good faith, PERB has held a *status quo ante* remedy is generally inappropriate to redress a refusal to bargain over impact and effects, (a) where the rescission of the management decision would disrupt or impair the Agency's operation and (b) there is no evidence that the result of such bargaining would negate the performance of a management right...As a result, even if the allegations of the Complainant were assumed to be true, the RIF should still remain in full force.

(Answer at pgs. 7-8).

Regarding the Union's statement about FMCS Case No. 111102-00414-A, the Agency alleges that FMCS does not have the authority to compel parties to appear before an arbitrator or arbitrate, in accordance with 29 CFR § 1404.4(d)(1)(2)(3). See, Answer at pgs. 8-9.

Concerning the Union's contention that the Agency failed to engage in good faith I&E bargaining, the Board notes that, pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right "[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]" *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) (2001) provides that "[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative." Further, D.C. Code §1-617.04(a)(5) (2001ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

In the present case, the Union and Agency are not in dispute that the Union provided several I&E proposals on October 12, 2010 and that the Agency failed to respond to the proposals. Nonetheless, the parties are in dispute as to whether the RIF occurred prior to the completion of the I&E bargaining. On

the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. Therefore, the Board declines to dismiss the allegation based on the pleadings alone.

Regarding the allegation that DYRS failed to provide information, the Board has previously held that materials and information relevant and necessary to its duty as a bargaining unit representative must be provided upon request. See, *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, __DCR__, Slip Op. No. 835, PERB Case No. 06-U-10 (2006). The Board's precedent is that an agency is obligated to furnish requested information that is both relevant and necessary to a union's role in: (1) processing a grievance; (2) an arbitration proceeding; or (3) collective bargaining. See, *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence does not present allegations sufficient to support the cause of action. See, *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at pg. 3, PERB Case No. 96-U-16 (1996).

In the present case, there is no dispute that the Union requested materials from the Agency which it considered necessary and relevant to its duty as a bargaining unit representative. Nevertheless, the parties do dispute whether DYRS denied DCDC's requests for information. In addition, the question of whether the information requested is, in fact necessary and relevant is a determination which requires further development for the record. See, *Ellowese Barganier v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections*, 45 DCR 4013. Slip Op. No. 542, PERB Case No. 98-S-03 (1998). On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. Therefore, the Board declines to dismiss the allegation based on the pleadings.

Regarding the Union's allegation that DYRS violated the CMPA by eliminating three (3) bargaining unit employees, the parties are in agreement that the Supervisory Medical Officer-MSS performs work previously done by the bargaining unit medical officers. However, the parties dispute whether DYRS contracted or hired additional positions to perform functions previously conducted by the bargaining unit medical officers. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. Therefore, the Board declines to dismiss the allegations based on the pleadings.

Concerning DCDC's allegation that DYRS violated the CMPA by refusing to select an arbitrator in FMCS Case # 111102-00414-A, the parties do not dispute that DYRS refused to select an arbitrator. However, the parties do dispute whether the matter was suitable for arbitration and whether the Agency was required to select an arbitrator. In addition, the parties dispute whether FMCS put the arbitration matter on hold. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the evaluation of evidence and the resolution of conflicting allegations. Therefore, the Board declines to dismiss the allegation based on the pleadings.

The Complaint, and its allegations against the Respondent, will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Youth Rehabilitation Services' request to dismiss is denied.

2. The Board's Executive Director shall refer the Doctors' Council of the District of Columbia's Unfair Labor Practice to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.

3. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

4. 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.

October 29, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-22 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of October 2011.

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