

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)	
)	
Barbara J. Milton,)	
)	
Complainant,)	
)	
v.)	PERB Case No. 98-U-28
)	Slip Op. No. 566
)	
District of Columbia Water and)	
Sewer Authority,)	
)	
Respondent.)	
)	
)	
)	

DECISION AND ORDER ON
REQUEST FOR PRELIMINARY RELIEF

On August 28, 1998, the Complainant Barbara J. Milton (Complainant) filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief, in the above-captioned case. On September 1, 1998, the Complainant filed a document styled "Amendment to Unfair Labor Practice Complaint and the Complainant's Motion for Preliminary Relief." The Complainant charges that the District of Columbia Water and Sewer Authority (WASA), has retaliated against her for filing an unfair labor practice complaint against WASA. By this conduct, Complainant asserts that WASA has committed unfair labor practices under the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code Sec. 1-618.4(a)(1), (2), (3), (4) and (5). (Comp. at 2.)

Complainant alleges WASA took the following retaliatory actions against her: (1) detailed her from her current position (in the Construction Management Branch) to the Utility Inspection

Branch; (2) denied her training request; and (3) withdrew a reasonable accommodation. (Comp. at 9-12 and Mot. at 1.) The Complainant claims WASA's actions were retaliatory. (Comp. at 3.)

The Complainant has requested that the Board grant her request for preliminary relief ordering WASA to: (1) rescind her detail; and (2) reinstate reasonable accommodations for her. (Mot. at 1-2.) The Complainant has also requested that the Board sanction WASA for retaliating against her and order WASA to pay Complainant's costs. (Mot. at 2.)

WASA filed an Answer to the Complaint denying that it has retaliated against the Complainant or engaged in any unlawful dealings with respect to the Complainant in violation of the CMPA. In addition, WASA filed a Response opposing Complainant's Motion for preliminary relief. In its Response, WASA contends that the allegations contained in the Complaint do not satisfy the criteria for granting preliminary relief.

WASA admits that the Complainant's supervisor "sought an arrangement which assured [that the] Complainant would not be in day to day contact with [her supervisor] (so that regardless of merit or lack thereof) no new issues would arise like those alleged in PERB Case [No.]98-U-24." (Ans. at 7.) However, WASA alleges that its "motivation was to insulate Complainant from whatever circumstances she may have found offensive in the manner she described in the earlier case." (Id.) WASA further states that the decision concerning Complainant's "training request was being deferred (not denied) until the return of Mr. Benson from his vacation (expected to be August 27, 1998), which would be well in advance of the September 4, 1998, registration date for the training program, so that he, the head of the administrative unit, could participate in the decision in this matter." (Ans. at 10.)

For the reasons explained below, we have decided to grant the Complainant's request for preliminary relief.

The criteria the Board employs for granting preliminary relief is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief. ...
Such relief shall be granted where the Board
finds that the conduct is clear-cut and flagrant;
or the effect of the alleged unfair labor

practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, or the Board's ultimate remedy will be clearly inadequate.

The Board has held that its authority under Board Rule 520.15 is discretionary. AFSCME, D.C. Council 20, et al. v. D.C. Gov't. et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise our discretion under this Rule, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of appeals -- addressing the standard for granting relief before judgement under Section 10(j) of the National Labor Relations Act-- held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where the Board determined that this standard for exercising its discretion has been met, the bases for such relief were restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." Clarence Mack, et al. v. FOP/DOC Labor Committee, et al., Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In the instant case, the Complainant has demonstrated a flagrant violation of the CMPA by WASA. In a memorandum concerning the Complainant's transfer, WASA makes it clear that the sole basis for Complainant's transfer is because she filed an unfair labor practice complaint. The Complainant's transfer will place her under a supervisor who has harassed her in the past. Indeed, she was transferred away from that supervisor as an accommodation of her claimed disability.

Accepting the truth of the matters asserted in the pleadings and in the supporting affidavits accompanying the Complainant's request, there is reasonable cause to believe that WASA's actions and conduct form the basis of an unfair labor practice as codified under D.C. Code Sec. 1-618.4(a)(4).¹ WASA's claims that the

¹D.C. Code Sec. 1-618.4(a)(4) provides as follows:

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

transfer was designed to prevent friction between her and the supervisor named in the unfair labor practice complaint is negated by its decision to transfer Complainant to the supervisor about whom she had previously complained. The transfer could be expected to produce just the sort of friction WASA claims it is seeking to avoid. We find that WASA can't take away (from the Complainant) a reasonable accommodation that was previously agreed to by the parties.² Moreover, we find no basis for WASA's decision to go forth with Complainant's detail/transfer after the Complainant reminded her supervisors of her handicap and offered the supervisors alternative options for their consideration. In addition, WASA asserts that the Complainant's training request was only being delayed until August 27, 1998 (the date that Leonard Benson, Chief of the Department of Engineering and Technical Services, was scheduled to return from vacation). However, WASA's Answer to the instant complaint was filed on August 28, 1998 or one day after Mr. Benson's scheduled return. Therefore, we find that by denying the Complainant's training request after Mr. Benson's scheduled return, there is reasonable cause to believe that WASA's denial of the Complainant's training request constituted further retaliation against the Complainant for filing her unfair labor practice complaint.³

As discussed above, by predicating Complainant's transfer on her filing an unfair labor practice complaint, WASA's conduct is "clear cut and flagrant". Also, by implementing its decision to detail/transfer the Complainant -- conduct which we find takes away a reasonable accommodation that was previously made for the Complainant in order to accommodate her claimed disability -- WASA

(continued)

- (4) Discharging or otherwise taking reprisals against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter;...

²Also, we do not believe that it is reasonable to detail the Complainant back to the same unit and the same supervisor from where she was previously transferred from. This initial transfer was made in order to provide the Complainant with a reasonable accommodation for her handicap.

³To date, we have not received any further communication from WASA concerning the status of the Complainant's training request.

has interfered with the Board's processes and rendered inadequate, under the circumstances, the Board's ultimate remedial authority.

Under the facts of this case, we conclude that the alleged violation and its impact satisfies two of the disjunctive criteria proscribed by Board Rule 520.15 for which preliminary relief may be accorded. Also, the remedial purposes of Board Rule 520.15 will be served by pendente lite relief for the Complainant, who (in the instant case) would otherwise lose a reasonable accommodation previously made for her, pending the full extent of the Board's processes before relief is ordered.⁴

In granting this preliminary relief, we find that WASA is precluded from: (a) withdrawing any reasonable accommodation previously made for the Complainant and agreed to between the Complainant and the Respondent; and (b) requesting additional documentation from the Complainant to justify any reasonable accommodation previously agreed to. Also, without deciding whether WASA was required to make a reasonable accommodation for the Complainant, we find that once WASA made a reasonable accommodation, it can't withdraw the accommodation and it can't require that the Complainant submit additional documentation to justify the previous accommodation that was agreed to. Our holding in this case would allow the employer to find other transfer opportunities for the Complainant where such a transfer would not adversely affect the Complainant.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's request for preliminary relief is granted to the extent set forth herein.
2. Based on the violations of the Comprehensive Merit Personnel Act alleged in the Complaint, the District of Columbia Water and Sewer Authority shall immediately rescind the Complainant's August 24, 1998 detail/transfer to the Utility Inspection Branch and return the Complainant to her position in the Construction Management Branch.

⁴Evidence submitted by the Complainant reveals that in a letter dated November 2, 1994, WASA acknowledged that reasonable accommodations had been made for the Complainant. In addition, WASA stated its "intent to continue providing accommodations of [the Complainant's] needs in the future...."

3. The District of Columbia Water and Sewer Authority, its agents and representatives shall continue to be enjoined from: (a) withdrawing any reasonable accommodation previously made for the Complainant and agreed to; and (b) requesting additional documentation from the Complainant to justify any reasonable accommodation previously agreed to.
4. The District of Columbia Water and Sewer Authority, its agents and representatives shall cease and desist from violating (1) the Comprehensive Merit Personnel Act or (2) taking any retaliatory action or reprisals against the Complainant for acts or conduct arising out of PERB Case Nos. 98-U-24 and 98-U-28.
5. The District of Columbia Water and Sewer Authority shall within seven (7) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, while this injunction remains in effect, or for thirty (30) consecutive days, whichever is longer.
6. The District of Columbia Water and Sewer Authority shall notify the Public Employee Relations Board, in writing, within ten (10) days from the issuance of this Decision and Order, that it has posted the attached Notice and is otherwise complying with the terms of this Order.
7. PERB Case Nos, 98-U-24 and 98-U-28 are consolidated and referred for a hearing in accordance with the expedited schedule set forth below. A Notice of Hearing shall issue seven (7) days prior to the scheduled date of the hearing.
8. Following the hearing, the designated hearing examiner shall submit a report and recommendation to the Board not later than twenty (21) days following the conclusion of closing arguments (in lieu of post-hearing briefs).
9. Parties may file exceptions and briefs in support of the exceptions not later than seven (7) days after service of the hearing examiner's report and recommendation. A response or opposition to exceptions may be filed not later than five (5) days after service of the exceptions.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
October 20, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached Decision And Order On Request For Preliminary Relief in PERB Case No. 98-U-28 was sent via facsimile and/or mailed (U.S. Mail) to the following parties on the 20th day of October 1998.

Barbara Milton
620 54th Street, N.E.
Washington, D.C. 20019

FAX & U.S. MAIL

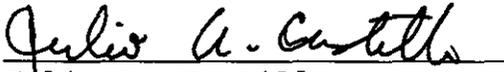
Alan M. Levy, Esq.
Linder & Marsack
411 E. Wisconsin,
Suite 1000
Milwaukee, WI 53202

FAX & U.S. MAIL

Courtesy Copies:

Betty L. Cheatham
Chief
D.C. Water and Sewer Authority
Office of Administrative Services
5000 Overlook Avenue, S.W.
Washington, D.C. 20032

U.S. MAIL


Julio A. Castillo
Executive Director