

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 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**

American Federation of Government Employees,
Local 2725,

Complainant,

v.

District of Columbia Department of Health,

Respondent.

PERB Case No. 09-U-65

Opinion No. 1003

DECISION AND ORDER

I. Statement of the Case:

On September 18, 2009, the American Federation of Government Employees, Local 2725, ("Complainant" or "Union") filed an Unfair Labor Practice Complaint against the District of Columbia Department of Health ("DOH"). The Complainant alleges that DOH has violated D.C. Code §1-617.04(a)(5)¹ by failing to respond to the Union's information request. (See Compl. at pgs. 1-2).

The Union is requesting that the Board: (a) find that DOH has committed an unfair labor practice; (b) order DOH to comply with the Union's "legitimate request for information" (Compl. at p. 2); (c) order DOH to cease and desist from violating the Comprehensive Merit Personnel Act; (d) order DOH to post a notice advising bargaining unit members that it violated the law; and (e) grant

¹D.C. Code §1-617-04 provides in relevant part as follows:

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

* * *

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

its request for fees and costs. (See Compl. at p. 2).

On October 8, 2009 the Office of Labor Relations and Collective Bargaining (on behalf of DOH) filed a document styled "Answer to Unfair Labor Practice Complaint." In its submission DOH denies that it has violated the Comprehensive Merit Personnel Act of 1978 ("CMPA"). Therefore, DOH is requesting that the Union's Complaint be dismissed. (See Answer at p. 2). The Union's Complaint and DOH's Answer are before the Board for disposition.

II. Discussion:

The Union asserts that on or about July 21, 2009, it submitted a letter to DOH "requesting information needed by Union in order to enforce the [collective bargaining agreement] and to determine if a grievance should be processed to arbitration." (Compl. at p. 1).

DOH did not provide a response to the Complainant's July 21st information request. (See Compl. at p. 1 and Answer at p. 2). In light of the above, on September 18, 2009, the Union filed its Complaint.

The Union asserts that DOH's failure "to respond to the Union's legitimate request for information" violates D.C. Code §1-617.04(a)(5). (Compl. at p. 1).

The Union requests that the Board find that DOH's conduct constitutes an unfair labor practice. (See Compl. at p. 2).

In its Answer to the Complaint DOH does not dispute the factual allegations regarding its failure to produce the information. DOH admits that on July 21, 2009, the Complainant made a written request for information. (See Answer at p. 1). DOH also concedes that as of the date the Complaint and Answer were filed, September 18, 2009 and October 8, 2009, respectively, DOH had failed to provide the Complainant with the requested information. (See Answer at p. 2). Nonetheless, DOH claims that it has not violated the CMPA. In support of its position, DOH asserts the following:

The Respondent admits that the letter referenced in paragraph three of the Complaint was sent . . . The information requested by the Union currently is being compiled by the agency and will be transmitted to the Union upon completion.

(Answer at pgs. 1-2).

DOH requests that the Board: (1) find that the Union's claim concerning DOH's failure to provide information does not constitute an unfair labor practice; and (2) dismiss the Complaint

because the Union has failed to state a cause of action for which relief can be granted. (See Answer at p. 2).

After reviewing the parties' pleadings, it is clear that: (1) DOH acknowledges that the Union made a written request for information; (2) DOH has not articulated any viable defense with respect to its failure to provide the information requested by the Union on July 21, 2009; and (3) as of October 8, 2009 (the date DOH submitted its Answer to the Complaint), DOH had not provided the information requested by the Union on July 21, 2009. The material issues of fact and supporting documentary evidence concerning DOH's failure to comply with the Union's July 21st information request is undisputed by the parties. Thus, the allegation concerning DOH's failure to produce information, does not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10², DOH's failure to produce information can appropriately be decided on the pleadings.

This Board has previously considered the question of whether an agency has an obligation to provide documents in response to a request made by a union. In *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272 at p. 4, PERB Case No. 90-U-10 (1991), we determined that "the employer's duty under the CMPA includes furnishing information that is 'both relevant and necessary to the Union's handling of [a] grievance' ...". Also, see *Teamsters, Local 639 and 730 v. D.C. Public Schools*, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and *Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health*, Slip Op. No. 809, PERB Case No. 05-U-41 (2005). The Supreme Court of the United States has held that an employer's duty to disclose "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *NLRB v. Acme Industrial Co.*, 385 U.S. 32, 36 (1967). "We have held that it is not the Board's role to determine the merits of a grievance as a basis for determining the relevancy or necessity of information requested by a union in the processing of a grievance." *Doctors' Council of the District of Columbia v. Government of the District of Columbia, et al.*, 43 DCR 5391, Slip Op. No. 353 at p. 5, PERB Case No. 92-U-27 (1996); *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, supra*, Slip Op. No. 272 at n. 6.

In the present case, we find that the requested information is both relevant and necessary to

²Board Rule 520.10 provides as follows:

If the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral arguments.

a legitimate collective bargaining function to be performed by the Union, i.e., the investigation, preparation and determination of whether to file a grievance under the parties' negotiated grievance procedure. *See Doctors' Council of the District of Columbia v. Government of the District of Columbia, et al., supra* and *University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, supra*. DOH does not assert a viable defense for its failure to provide the information. Also, DOH does not assert that all of the requested information was not available on the date it was requested. Instead, DOH argues that "[t]he information requested by the Union currently is being compiled by the agency and will be transmitted to the Union upon completion." (Answer at p. 2).

After reviewing the evidence, we find that DOH did not respond to the Union's request³ and has failed to provide a viable defense for failing to provide the requested information. This Board has held that an agency does not satisfy its statutory obligation by eventual but belated responses to requests for information, particularly responses that are provided only after an unfair labor practice complaint has been filed. *See Doctors Council of D.C. General Hospital v. D.C. Health and Hospitals Public Benefit Corp.*⁴ Even assuming that DOH eventually provides the information requested, it is not enough that the agency respond, but it must do so in a timely manner. When DOH filed its Answer on October 8, 2009, almost three months had elapsed since the Union made its request for information and DOH had still not provided the requested information. Furthermore, to date, DOH has not submitted proof that it has responded to the Union's information request. We believe that DOH has had more than a reasonable period of time to comply with the Union's request for information. For the reasons discussed above, we find that DOH has failed to show any countervailing concerns which outweigh its duty to disclose the requested information.

Under the facts of this case, we conclude that by failing and refusing to produce information for which DOH did not raise any viable defense, DOH failed to meet its statutory duty of good faith bargaining, thereby violating D.C. Code §1-617.04(a)(5). *See, Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health, Slip Op. No. 809 at p. 7, PERB Case No. 05-U-41 (2005)*. In addition, we have held that "a violation of the employer's statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with

³In its Answer, DOH acknowledges that it has not provided the information requested by the Union. Also, DOH claims that it intends to provide the information requested but does not state a date by which it intends to comply with the Union's request. Furthermore, to date, DOH has not submitted proof that it has responded to the Union's information request.

⁴47 D.C. Reg. 10108. Slip Op. No. 641, PERB Case No. 00-U-29 (2000). *See also, Providence Hospital and Mercy Hospital and Massachusetts Nurses Association, 320 NLRB 790, 794 (1996)*.

the employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing." *American Federation of State, County and Municipal Employees, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990).⁵ In the present case, we find that DOH's failure to bargain in good faith with the Union constitutes derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § 1-617-04(a)(1) (2001 ed.).

Since we have determined that DOH has violated the CMPA by not providing in a timely manner the information requested by the Union, we now turn to the issue of what is the appropriate remedy in this case. The Union is asking that the Board order DOH to: (1) provide the information requested by the Union; (2) post a notice; (3) pay the Union's fees and costs; and (4) cease and desist from violating the CMPA. (See Compl. at p. 2).

Clearly DOH must produce the information requested by the Union on July 21, 2009. Therefore, we grant the Union's request that DOH be ordered to provide the information requested by the Union.

The Union has also requested that the Board order DOH to post a notice acknowledging that it has violated the CMPA. Concerning the posting of a notice, the Board has previously noted that, "[w]e recognize that when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices, is the protection of rights and obligations". *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). Moreover, "it is the furtherance of this end, i.e., the protection of employees rights, ... [that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violation found and the relief afforded" *Charles Bagenstose v. D.C. Public Schools*, 41 DCR 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). We are requiring that DOH post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of DOH's conduct and thereby affected by it, will know that exercising their rights under the CMPA is indeed fully protected. Also, a notice posting requirement serves as a strong warning against future violations. For the reasons noted above, we grant the Union's request that DOH be ordered to post a notice.

⁵See also, *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1999); *Committee on Interns and Residents v. D.C. General Hospital*, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1996); *University of the District of Columbia v. University of the District of Columbia Faculty Association*, *supra*.

The Union has requested that fees and costs be awarded. (See Compl. at p. 2). D.C. Code § 1-617.13 does not authorize the Board to award attorney fees. See, *International Brotherhood of Police Officers, Local 1445, AFL-CIO/CLC v. District of Columbia General Hospital*, 39 DCR 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). Therefore, if the Complainant's request for fees is a request for attorney fees, that request is denied. As to the Complainant's request for costs, the Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990).⁶ In the *AFSCME* case, the Board concluded that it could, under certain circumstances, award reasonable costs, stating:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued . . . What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably[y] foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* at pgs. 4-5.

In the present case, it is clear that the Union made a request for information on July 21, 2009. However, as of October 8, 2009 (the date DOH's Answer was filed), DOH had not: (a) provided the information requested by the Union; or (b) articulated a viable defense or countervailing concern which outweighs its duty to disclose the requested information. Furthermore, to date, DOH has not submitted proof that it has responded to the Union's information request. We find that under the circumstances of this case: (1) DOH's position was without merit; and (2) a reasonably foreseeable result of DOH's conduct was the undermining of the Union among the employees for whom it is the exclusive representative.

⁶The Board has made it clear that attorney fees are not a cost.

In view of the above, we believe that the interest-of-justice criteria articulated in the *AFSCME* case would be served by granting the Union's request for reasonable costs. Therefore, we grant the Union's request for costs.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health ("DOH"), its agents and representatives shall cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 2725 ("Complainant" or "Union") by failing to provide the information requested by the Union in its July 21, 2009, letter. The information requested by the Union on July 21, 2009, shall be provided to the Union no later than fourteen (14) days from the issuance of this Decision and Order.
2. DOH, its agents and representatives shall cease and desist from interfering with, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter VII Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.
3. For the reasons stated in this Slip Opinion, the Complainant's request for reasonable costs is granted.
4. Within fourteen (14) days from the issuance of this Decision and Order, the Complainant shall submit to the Public Employees Relations Board ("Board"), a written statement of actual costs incurred in processing this unfair labor practice complaint. The statement of costs shall be filed together with supporting documentation. DOH may file a response to the Complainant's statement of costs within fourteen (14) days from the service of the statement of costs upon it.
4. DOH shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for (30) consecutive days.
5. Within fourteen (14) days from the issuance of this Decision and Order, DOH shall notify the Board, in writing, that the Notice has been posted accordingly. Also, within fourteen (14) days from the issuance of this Decision and Order, DOH shall notify the Board of the steps it has taken to comply with paragraph 1 of this Order.

6. 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.

December 30, 2009



Public
Employee
Relations
Board

Government of the
District of Columbia

==

717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005

[202] 727-1822/23
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1003, PERB CASE NO. 09-U-65 (December 30, 2009)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1003.

WE WILL cease and desist from refusing to provide the American Federation of Government Employees, Local 2725, with requested information relevant and necessary to its representational duties.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management Subchapter of the District of Columbia Comprehensive Merit Personnel Act.

District of Columbia Department of Health

Date: _____

By: _____
Director

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

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

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

December 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-65 was transmitted via Fax and U.S. Mail to the following parties on this the 30th day of December 2009.

Eric Bunn, President
AFGE, Local 2725
P.O. Box 75960
Washington, D.C. 20013-5960

VIA FAX & U.S. MAIL

Natasha Campbell, Director
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VIA FAX & U.S. MAIL

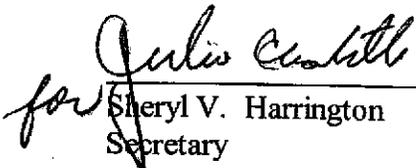
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VIA FAX & U.S. MAIL

COURTESY COPY:

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Washington, D.C. 20002

U.S. MAIL


for Sheryl V. Harrington
Secretary