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:

America Federation of Government Employees, Local 872,

Complainant,

v.

District of Columbia Water and Sewer Authority,

Respondent.

PERB Case No. 00-U-20

Opinion No. 631

DECISION AND ORDER ON REQUEST FOR PRELIMINARY RELIEF

On March 20, 2000, the American Federation of Government Employees, Local 872 (AFGE) filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief, in the above-referenced case. The Complaint alleges that the District of Columbia Water and Sewer Authority (WASA) violated D.C. Code Sec. 1-618.4(a)(1) and (5) by: (a) unilaterally publishing and implementing new personnel policies effecting terms and conditions of employment; and (b) failing to engage in impact bargaining. Also, AFGE contends that WASA's new policies have caused a change in long standing past practices. (Comp. at par.9) The Complainant has asked the Board to grant their request for preliminary relief ordering WASA to: (1) rescind the new personnel policies (i.e. change in tour of duty hours, leave procedures, overtime procedures, etc.); and (2) engage in impact and effect bargaining. (Mot. at p.3)

WASA filed a Response opposing the Complainant's Motion for Preliminary Relief. In its Response, WASA argues that the allegations contained in the Complaint do not satisfy the criteria for granting preliminary relief.

The Complaint alleges that on February 22 and March 27, 2000,

WASA implemented new personnel policies concerning tour of duty hours, lunch periods and overtime procedures. In addition, on February 23rd WASA issued new procedures for requesting leave. (Comp. at par. 10). AFGE asserts that prior to these changes, employees were allowed: (1) one hour lunch breaks; and (2) to work pre-approved overtime without supervision.[1]/ AFGE contends that the new policies, "change long standing past procedures". (Comp. at par.9). AFGE claims that WASA unilaterally implemented the new polices without bargaining with AFGE.[2]/ AFGE concedes that not all of the matters covered by the new personnel policies are mandatory subjects of bargaining. However, it contends that "[n]egotiations are required over the impact and effect of the changes even if negotiations are not required over the merits of the decisions." (Mot. at par.2)

WASA admits that it implemented new personnel policies. However, WASA alleges that it has not engaged in any conduct which violates the Comprehensive Merit Personnel Act (CMPA). In addition, WASA asserts that the parties' collective bargaining agreement (CBA), "gives WASA the right to establish work rules and manage work loads, overtime, and leave usage without bargaining with the Union over the decision to implement such rules". (Opp. at p. 3)

Without deciding whether the allegations indicate a violation of the CMPA, the Board concludes that inadequate evidence was presented to establish that the remedial purpose of the law would be served by the pendente lite relief. For the reasons discussed below, we find that the Complainant's request for preliminary relief does not meet the threshold criteria that the Board has

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[1]/ In the Complaint, AFGE asserts that the changes in work rules were only implemented "against the employees in the Billing and Collection Division of the Department of Water Measurement and Billing", (Comp. at par. 11). This is the division where the Union President and other supporters of the union work".Id.

[2]/ In addition to AFGE Local 872, four other unions are parties to the Master Agreement on Working Conditions: AFGE Locals 631 and 2553; AFSCME Local 2091; and NAGE Local R3-05 and 06. None of these four unions has joined as a party in PERB Case No. 00-U-20. However, all five unions have filed an unfair labor practice complaint against WASA (PERB Case No. 00-U-14) alleging that WASA unilaterally implemented a variety of new personnel policies and procedures. Also, on March 13th Local 872 filed another unfair labor practice complaint against WASA (PERB Case No. 00-U-19).

adopted for granting preliminary relief.

The criteria the Board employs for granting preliminary relief is prescribed under Rule 520.15. Board Rule 520.15 provides in pertinent part as follows:

> The Board may order preliminary relief 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, and the Board's ultimate remedy may 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. Government et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under this rule, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1071). 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 [PERB] has determined that the standard for executing 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., 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos.97-S-01, 97-S-02 and 95-S-03 (1997).

AFGE claims that the facts alleged in the Complaint are undisputed. AFGE's claim is correct only with respect to the implementation dates of the new policies. Specifically, the parties agree that new personnel policies were implemented on February 22nd , February 23rd , and March 27, 2000,respectively. However, a dispute exists as to whether: (1) WASA had a duty to bargain with AFGE prior to implementation of the new policies; and (2) AFGE waived its right to engage in impact bargaining. In addition, WASA disputes the material elements of all the allegations asserted in the Complaint. The Board has found that preliminary relief is not appropriate where material facts are in dispute. See, D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U- 11 (1998). In its Motion, AFGE

acknowledges that "[p]reliminary relief is inappropriate where material facts are in dispute." (Mot. at p 2).

The Board has held that management's rights under D.C. Code § 1-618.8(a) do not relieve it of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning, the implementation of these management right decisions. IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). The effect and impact of a non-bargainable management decision upon terms and conditions of employment, however, are bargainable only upon request. Teamsters, Local 639 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). Furthermore, the Board has determined that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-618.4(a)(1) and (5) by unilaterally implementing a management right under D.C. Code § 1-618(a), without notice or bargaining. University of the District of Columbia Faculty Association v. University of the District of Columbia, 43 DCR 5594, Slip, Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). In view of the above, the determination concerning whether AFGE requested bargaining, is a "question of fact" to be determined after a hearing.

WASA argues that the CBA permits it to adopt and modify personnel policies, without bargaining over the implementation of such policies. (Opp. at p.2). In light of WASA's assertion, it appears that one of the allegations may involve a possible violation of the CBA and not a statutory violation. It is well settled that contractual violations fail to state a statutory cause of action under the CMPA. See, AFGE, Local 3721 v. D.C. Fire Dept., 39 DCR 8599, Slip. Op. No. 287, PERB Case No. 90-U-11 (1992). Therefore, a dispute exist concerning whether the alleged violation is statutory or constructional in nature. This issue can best be resolved through a hearing.

In the instant case, AFGE does not claim that WASA's alleged illegal actions are widespread or seriously affect the public interest. In addition, as discussed above, it does not appear that WASA's unilateral implementation of new personnel policies (without bargaining), constitute clear cut and flagrant violations of the CMPA. Whether WASA's actions rise to the level of violations of the CMPA, is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing.

AFGE contends that preliminary relief is appropriate.

However, they do not assert why any later remedy imposed by the Board would be inadequate. Instead, AFGE cites, without explanation, the Board's decision in AFGE et al. v. Government of the District of Columbia, PERB Case No. 97-U-01, Slip Op. No. 501 (1996), in support of its contention that WASA's unilateral changes in policies prior to the Board ruling on the unfair labor practice complaint, interferes with the Board's processes. Such alleged interference is not obvious to the Board.

Also, AFGE has failed to provide evidence which demonstrates that the allegations, even if true, are such that the remedial purposes of the law would be served by pendente lite relief. We believe that should violations be found in the instant case, the relief requested can be accorded with no real prejudice to AFGE.

Under the facts of this case, the alleged violations and their impact, do not satisfy any of the criteria prescribed by Board Rule 520.15. Therefore, the circumstances presented do not appear appropriate to warrant preliminary relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's request for preliminary relief is denied.

2. PERB Case Nos. 00-U-14, 00-U-19 and 00-U-20 are consolidated.

3. The Executive Director shall refer the Consolidated Complaints to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.

4. The Notice of Hearing shall issue seven (7) days prior to the scheduled date of the hearing.

5. Following the hearing, the designated hearing examiner shall submit a report and recommendation to the Board not later that Twenty-one (21) days following the conclusion of closing arguments (in lieu of post-hearing briefs).

6. Parties may file exceptions and briefs in support of the exceptions no later that seven (7) days after service of the hearing examiner's report and recommendation. A response or opposition to exceptions may be filed no later than five (5) days after service of the exceptions.

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

July 14, 2000

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 00-U-20 was served by first class mail, on the following parties on this 14th day of July, 2000.

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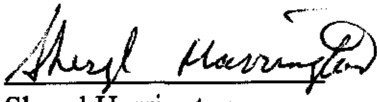

Sheryl Harrington
Secretary