GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: District of Columbia Nurses Association, Complainant, v. The Mayor of the District of Columbia, and District of Columbia Health and Hospitals Public Benefit Corporation, District of Columbia General Hospital, Respondents.	PERB Case No. 95-U-03 **FOR PUBLICATION**
District of Columbia Nurses Association, Complainant, v. District of Columbia Health and Hospitals Public Benefit Corporation, District of Columbia General Hospital, Respondent.	PERB Cases Nos. 97-U-16 and 97-U-28 Opinion No. 558

DECISION AND ORDER

The facts of PERB Case No. 95-U-03 presents the Board with issues of first impression with respect to determining whether the duty to bargain in good faith under the Comprehensive Merit Personnel Act (CMPA) has been violated in lieu of the Health and Hospitals Public Benefit Corporation Act of 1996, D.C. Law 11-212. Therefore, we shall sever PERB Case No. 95-U-03 from this consolidated proceeding for further consideration and disposition. The background and issues underlying the remaining cases, i.e., PERB Case Nos. 97-U-16 and 97-U-28, are set out by the Hearing Examiner in his Report and Recommendation.[1]/ The Hearing Examiner found that the Respondent District of Columbia Health and Hospitals Public Benefit Corporation (PBC), District of Columbia General Hospital (DCGH), committed unfair labor practices proscribed by the Comprehensive Merit Personnel Act, as codified under D.C. Code § 1-618.4(a)(1) and (3) and declined to find a violation of D.C. Code Sec. 1-618.4(a)(5).

In PERB Case No. 97-U-16, the PBC/DCGH excepts to the Hearing Examiner's conclusion that the PBC/DCGH violated the *Weingarten* rights of two bargaining unit employees when the PBC/DCGH threatened to discipline one of the employees when she requested union representation by the other union officer.[2]/ The PBC/DCGH, citing National Labor Relations Board (NLRB) precedent, argues that *Weingarten* is not violated if the supervisor did not question the employee after refusing the employee's request for union representation. The PBC/DCGH states that the Hearing Examiner found no persistence by DCGH officials to continue interviewing the employee after denying her request for union representation.

The PBC/DCGH's argument misses the mark. The violation found by the Hearing Examiner was DCGH officials' threat to discipline two employees because one of them had exercised her right to union representation. (R&R at 10.) Under these circumstances, the fact that the DCGH official did not proceed to interview the employee after she invoked *Weingarten* is not relevant to a finding that the PBC/DCGH interfered with, restrained or coerced the employee in the exercise of recognized

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[1]/ The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

[2]/The Board has recognized a right to union representation during a disciplinary interview. See, NLRB v. Weingarten, Inc, 420 US 251 (1975); Georgia Mae Green v. D.C. Dept of Corrections, 37 DCR 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990).

rights under the CMPA in violation of D.C. Code Sec. 1-618.4(a)(1). See, e.g., Teamsters, Local 1714, a/w IBTCWHA v. D.C. Dept of Corrections, 43 DCR 2661, Slip Op. No. 360, PERB Case No. 92-U-09 (1996).

Finally, the PBC/DCGH contends that the Complainant failed to allege that the two employees were disciplined, i.e., transferred, for reasons proscribed under D.C. Code Sec. 1-618.4(a)(3). As such, the PBC/DCGH contends that "this improper lack of notice [is] a fatal defect to the Union's charge." (PBC Except. at 8.) The Hearing Examiner addressed this issue as follows:

> The remaining allegation is the charge that the reassignment of Burns and Terry-Haley was for disciplinary reasons and in retaliation for their insistence that Terry-Haley was entitled to union representation. Under this theory, the charge and the complaint should allege that the conduct violated Section 1-618.4(a)(3), but it does not. Under the rules of common law pleading, this failure would be considered a fatal defect and the allegation would be dismissed. However, under modern rule of pleading, the complaint serves only as a means of informing a respondent of the nature of the charges against it. The test is whether it can fairly be said that a respondent was aware of the theory upon which the violation was predicated. Here, the reassignments were litigated on the basis that they were a violation of Section 1-618.4(a)(3) of the CMPA and therefore, the complaint's defect is not an obstacle to the making of this finding.

In our view, the Hearing Examiner's analysis adequately disposes of this issue and we shall defer to it. Under such circumstances we have similarly amended what amounts to a technical defect in the cited statutory provision alleged as violated. See, Teamsters, Local 730, a/w IBTCWHA v. D.C. Public Schools, 43 DCR 5587, Slip Op. No. 375, PERB Case No. 93-U-11 (1996). Moreover, our review of the record reveals that it is replete with testimony and other evidence presented by both parties on this charge without objection. As such, the PBC's willing participation in the litigation of the violation is tantamount to consent and, thereby, a waiver of any subsequent objection based on a lack of notice.

The PBC/DCGH also objects to the recommended relief afforded the employees. We have held that a status quo ante remedy that

returns affected employees to their positions, or to substantially equivalent positions, prior to an unlawful adverse action, e.g., transfer, and makes them whole for any resulting loss is appropriate relief. See, e.g., Charles Bagenstose, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case No. 88-U-33 and 88-U-34 (1991). Issues raised by the PBC/DCGH concerning the extent of that loss are accounting matters regarding compliance, not issues affecting its culpability for the violation. The parties should first attempt to work such issues out amongst each other.

We now turn to the one exception made by the Complainant. The Hearing Examiner found that the PBC/DCGH did not violate D.C. Code Sec. 1-618.4(a)(5) by failing to provide DCNA, upon request, with witness statements generated during its investigation of an altercation involving one of the transferred employees. DCNA's request was made pursuant to a grievance it had filed over the incident. Citing Anheuser-Busch and Electrical Workers (IBEW), Local 2295, 237 NLRB 982 (1978), the Hearing Examiner concluded that although "most information requests for data to pursue a grievance have been presumed necessary and relevant, ... the statements of witnesses are not the type of information that a party is entitled to receive prior to the arbitration." (R&R at 13.)

DCNA contends that factors peculiar to District government employment and the parties renders inapplicable the Anheuser-Busch exceptions to the right of unions to receive otherwise necessary and relevant information. DCNA asserts that: (1) under the Freedom of Information Act, 5 U.S.C. Sec. 552 (FOIA), employees are entitled to access to the contents of any files maintained by their employer relating to them; (2) unlike the NLRB, the PERB does not conduct *ex parte* pre-hearing investigations; and (3) issues of witness coercion does exist since the PBC/DCGH has regularly provided the DCNA with witness statements and has not alleged one instance of any adverse contact with a witness by DCNA.

DCNA correctly notes that the NLRB's rationale for circumscribing this union right to information in Anheuser-Busch was largely based on an analogous rationale made by the Supreme Court in N.L.R.B. v. Robbins Tire and Rubber Company, 98 S.Ct. 2311 (1978). There, the Court held that FOIA does not require the NLRB to disclose, prior to hearing, statements it prepared during its investigation of a complaint. In Anheuser-Busch, the NLRB observed that the same interest in preventing such statements from being used to coerce or intimidate witnesses was present in investigative statements underlying or taken pursuant

to matters that are grieved. Therefore, subjecting investigative witness statements to disclosure to third parties, the NLRB concluded, would not advance the grievance-arbitration process.

DCNA's right to information from an agency employer that is necessary and relevant to its collective bargaining function stems from our conclusion that this right, first articulated by the Court in N.L.R.B. v. Acme Industries Co.,385 U.S. 432 (1967), is also afforded certified labor organizations under the CMPA. See, University of the District of Columbia Faculty Association v. University of the District of Columbia, 36 DCR 2469, Slip Op. No. 215, PERB Case No. 86-U-16 (1989). This union right, however, has always been balanced against confidentiality concerns. Id. Although the Board does not conduct *ex parte* pre-hearing investigations, the object of this exception are statements obtained during underlying investigations of grievance-arbitration proceedings.[3]/

Furthermore, notwithstanding what rights District government employees may have to witness statements under FOIA, such employee rights to information under FOIA does not give rise to a union right under the CMPA. Similarly, the past practice of these parties with respect to witness statements does not provide a basis for establishing a general statutory right for recognized labor organizations under the CMPA.[4]/ A bargaining unit employee's right under FOIA to witness statements relevant to its grievance-arbitration proceeding or an employer agency's practice of providing such statements to labor organizations representing its employees during such proceedings does not provide a sufficient basis for finding inapplicable under the CMPA the confidentiality concerns of this information, as found by the NLRB in Anheuser-Busch. We note, however, that our holding does not extend to a union's right to such employee statements at the arbitration hearing if such statements are deemed relevant to the evidence presented.

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[3]/ Although we have the power to require the production of "any necessary records or other information which have a bearing on [a] dispute" in connection with proceedings within our jurisdictional authority, we must exercise that authority "without... abrogating rules and regulations abridging the confidentiality of personnel files as provided in subchapter XXXII of the [CMPA]". D.C. Code § 1-605.2(8).

[4]/ DCNA made no prior contention and no finding was made by the Hearing Examiner that the PBC/DCGH's failure to provide witness statements violated its past practice with DCNA.

ORDER

IT IS HEREBY ORDERED THAT:

1. PBC/DCGH, its agents and representatives shall cease and desist from interfering with, restraining or coercing its employees in the exercise of rights guaranteed by the Labor-Management sub-chapter of the CMPA by threatening bargaining unit employees Ann Marie Terry-Haley and Robin Burns with discipline in violation of D.C. Code Sec. 1-618.4(a)(1).

2. PBC/DCGH, its agents and representatives shall cease and desist from discriminating in regard to hiring or tenure of employment or any term and condition of employment to discourage membership in any labor organization by transferring bargaining unit employees Ann Marie Terry-Haley and Robin Burns in violation of D.C. Code Sec. 1-618.4(a)(3).

3. PBC/DCGH, its agents and representatives shall: (a) rescind the transfer of employees Ann Marie Terry-Haley and Robin Burns; (b) reinstate them to their former positions or to substantially equivalent positions; (c) purge from their personnel records any documentation that may exist concerning the stated reasons for their transfer; and (d) make them whole in accordance with law for any lost compensation or benefits due to their transfer.

4. PBC/DCGH, its agents and representatives shall cease and desist from interfering, restraining coercing, in any like or related manner, employees represented by DCNA in the exercise of rights guaranteed by the Labor-Management sub-chapter of the CMPA.

5. PBC/DCGH shall, within ten (10) days from the service of this Decision and Order, post for thirty (30) consecutive days the attached Notice, dated and signed, conspicuously on all bulletin boards where notices to these bargaining-unit employees are customarily posted.

6. DCGH/PBC shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly and what steps it has taken to comply with paragraph 3 of this Order.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.
June 24, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 97-U-16 and 97-U-28 was mailed (U.S. Mail) to the following parties on the 24th day of June, 1998.

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