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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Teamsters Local Union 639 a/w)	
International Brotherhood of Teamsters,)	
)	
Complainant,)	PERB Case No. 11-U-10
)	
v.)	Opinion No. 1266
)	
District of Columbia Public Schools,)	
)	
Respondent.)	Motion to Dismiss
)	
)	

DECISION AND ORDER

I. Statement of the Case

Teamsters Local Union No. 639, International Brotherhood of Teamsters (“Complainant”, “Union” or “Teamsters Local 639”) filed the instant Unfair Labor Practice Complaint (“Complaint”) against District of Columbia Public Schools, (“Respondent”, “DCPS” or “Agency”). The Complainant is alleging that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by refusing to adhere to an agreement to allow former DCPS food service workers to access their accrued DCPS sick leave, thereby constituting a refusal to bargain in good faith with the Union. (See Complaint at p. 6).

The Complainant requests that the Board:

- (1) order DCPS: (a) to allow former DCPS food service workers employed by Chartwells to access their accrued DCPS sick leave, consistent with the obligation acknowledged by DCPS, relied upon by the Union and its members and clearly evidenced by DCPS’s own past conduct; (b) to honor the agreement reached with respect to allowing former DCPS food service workers employed by Chartwells to access their accrued DCPS sick leave while employed by Chartwells; (c) to post an appropriate notice advising

that Respondent violated D.C. law and will cease and desist from such violations in the future; and

(2) award costs and fees pursuant to D.C. Code § 1-617.13(d); and

(3) take such other action as PERB deems necessary and appropriate to remedy the unfair labor practices.

(See Complaint at p. 7).

DCPS filed an Answer to the Unfair Labor Practice Complaint ("Answer") denying the allegations set forth in the Complaint and any violation of the CMPA. (See Answer at pgs. 4-6). In addition, DCPS asserted several affirmative defenses to the Complaint's allegations and requests that the Board dismiss the Complaint. (See Answer at pgs. 7-8). The Union's Complaint and DCPS' Answer and motion to dismiss are before the Board for disposition.

II. Discussion

Petitioner is a labor organization within the meaning of the CMPA. Teamsters Local 639 maintains its principal office at 3100 Ames Place, N.E. Washington, D.C. 20018. (See Complaint at p. 1), Respondent is an agency of the District of Columbia and has the authority under the CMPA to negotiate and execute collective bargaining agreements with labor organizations concerning wages, hours and other terms and conditions of employment and maintains its principal office at 1200 First Street, N.E., Washington, D.C. 20002. (See Complaint at p. 2; and Answer at pgs. 2-3).

The Union alleges that:

[o]n June 24, 1986, Teamsters Local 639 and Teamsters Local 730 (the "Teamster Locals") were jointly certified by the Public Employee Relations Board ("PERB") as the exclusive bargaining agent for DCPS employees in the following five bargaining units: Operating Engineers Unit, Custodian Unit, Transportation and Warehouse Service Unit, Cafeteria Managers Unit and Cafeteria Workers Unit.

(Complaint at p. 2.)

The parties agree that the:

Teamster Locals and DCPS have been parties in a continuous collective bargaining relationship, embodied in various collective bargaining agreements, covering a variety of classifications and units, including those

referenced above. After their certification, the Teamster Locals initially adopted a collective bargaining agreement negotiated between DCPS and a predecessor union. Subsequently, the Teamster Locals and DCPS entered into a collective bargaining agreement for the period of 1987-1990. Successor agreements have been entered into up to the present time.

(Complaint at p. 2; and Answer at p. 2).

The Union claims that it “has represented the portion of the DCPS bargaining unit employed as food service workers. In or about 2008, DCPS contracted out food service work to a private company, Chartwells/Thompson. A large number of DCPS food service workers were subsequently employed by that employer under a successor collective bargaining agreement negotiated by Teamsters 639 and this successor employer.” (Complaint at pgs. 2-3).

However DCPS asserts that “that it played no role in negotiating any successor collective bargaining agreement between Teamster Local 639 and Chartwells. All remaining allegations presented in paragraph 5 are denied in their entirety.” (Answer at p. 2).

The Union alleges that, while employed by DCPS, the cafeteria workers accumulated a significant amount of sick leave. (See Complaint at p. 3). However, DCPS does not agree with the Union’s allegation that “many of these individuals were long time DCPS employees who carried over their sick leave and had settled expectations that they would be able to use this leave in the event they became ill as they got older.” (Answer at p. 3).

The Union also believes that when DCPS contracted out its food service work, that it had received assurances that:

the affected food service workers that DCPS would honor the accumulated leave that these individuals had earned during their years of services for the District of Columbia Public School System. [In addition, t]he earned leave was to roll over and be available for the employee to use in his/her position with Chartwells.

(Complaint at p. 3).

DCPS, however, does not admit that these discussions can be correctly characterized as assurances or that such statements would be legally binding on DCPS. (See Answer at p. 3).

The Union argues that:

[t]hese assurances were made both orally and in writing to the Union and its members on multiple occasions during the time that the affected employees made the transition from DCPS employment to employment with Chartwells. For example, in or about August, 2008 representatives from DCPS met with DCPS food service workers at the Union hall to address the employment transition and reiterated DCPS's commitment that former DCPS employees who were transferred to employment with Chartwells would be able to access their DCPS accrued sick leave balances while employed by Chartwells. Present at this meeting for DCPS were, among others, Peter Weber the Director of Human Resources for DCPS and David Goodman, the Director of Food and Nutritional Services for the District of Columbia.

(Complaint at p. 3)

DCPS denies that it made any written assurances to the Union and its affected food service worker members that "former DCPS workers who were transferred to employment with Chartwells would be able to access their DCPS accrued sick leave balances while employed by Chartwells." (Answer at p. 3). In addition, DCPS denies that the verbal discussions referenced in paragraph 8 of the Complaint can be correctly characterized as "assurances" and, even if they can, such verbal assurances would not be legally binding on DCPS. (Answer at p. 3).

The Union also alleges its members:

received written confirmation that the DCPS sick leave balances earned by DCPS employees would be honored by DCPS while these individuals were employed by Chartwells. In or about November, 2008, Kaya Henderson, the Deputy Chancellor of DCPS at the time and now the Acting DCPS Chancellor, unequivocally told the Union and its members that "DCPS is committed to ensuring that its former food service employees, now employed by Chartwells, are able to access their DCPS accrued sick leave balances after beginning their employment with Chartwells." Ms. Henderson went on to state that "[y]our full amount of sick leave will transfer with you; however you must use your Chartwells' allotted leave before dipping into the DCPS bank.

(Complaint at p. 3).

However, DCPS denies that it made any written assurances to the Union and its affected food service worker members as characterized in paragraph nine of the Complaint. Respondent denies that can be correctly characterized as “assurances” and, even if they can, that assurances would be legally binding on DCPS. (See Answer at p. 4).

The Union claims that DCPS “failed to initially honor the accumulated sick leave earned by food service workers when they began working for Chartwells. As a result, in or about January, 2009, the Union requested an arbitration hearing to require DCPS to honor the commitment it made to its food service employees.” (Complaint at p. 4).

DCPS’ Answer “admits that it initially declined to honor any accumulated sick leave by its former food service workers but that it later indicated that it would attempt to do so on a case-by-case basis given that there had been no funds appropriated for this purpose and that the contract between DCPS and Chartwells did not make provision for such payments to be made.” (Answer at p. 4).

The Union indicates that:

the parties scheduled an arbitration hearing but continued to discuss a resolution of this matter. During these discussions DCPS explained to the Union that it needed to work out an agreement with Chartwells with respect to the manner the former DCPS food service employees would be able to access their sick leave while employed by Chartwells. At no time, however, did DCPS indicate that it would not honor its previously made promise to allow these employees to use their accrued DCPS sick leave. Indeed, in or about March, 2009 DCPS began to communicate with its former employees who were employed by Chartwells to advise them that they would be allowed to start to access their accrued DCPS sick leave. DCPS told former DCPS employees that “[a]ll accrued [DCPS] sick leave did rollover from DCPS to Chartwells/Thompson; however, no one was allowed to use it until Chartwells/Thompson and DCPS came to an agreement regarding payback terms. This has just occurred and a contract addendum is in the process of being signed.” In or about June, 2009, DCPS followed up on this communication with an email to the Union. In that email, Traci Higgins, the DCPS Director of Labor Management & Employee Relations advised the Union that DCPS had “reached an agreement with Chartwells” on the sick leave payment. Ms. Higgins further explained that all

that was left to do was "papering the agreement." Finally, Ms. Higgins stated, once again, that DCPS "acknowledge[d] the obligation" to its former food service employees.

(Complaint at pgs 4-5).

DCPS states in its Answer that:

[it] admits that it made good faith attempts to amicably resolve the claim that formed the basis of the arbitration referenced in paragraph eleven. Respondent further asserts that it attempted to work out an arrangement with Chartwells whereby the accumulated sick leave could be accessed through Chartwells but that this arrangement fell by the wayside when it was ascertained that there were no appropriated funds to address the accumulated sick leave. Respondent also asserts that although it attempted in good faith to accommodate the accumulated sick leave for the affected food service bargaining unit members, it was nevertheless required to comply with federal and District laws and regulations and that it could not accommodate the accumulated sick leave if the result was that it would violate federal and/or District Anti-Deficiency laws and regulations and that this financial commitment would require prior Congressional appropriation.

(Complaint at pgs. 4-5).

The parties do not dispute that the Union agreed to postpone the scheduled arbitration hearing. (See Complaint at p. 5; and Answer at p. 5).

The Union asserts that:

DCPS began to pay out sick leave to former DCPS food service employees who were working for Chartwells. At the same time, the Union continued to communicate with DCPS to resolve the few remaining issues with respect to how former DCPS members would be allowed to access their accrued DCPS sick leave. For example, in or about September, 2009, DCPS informed the Union that the DCPS sick leave would not be reflected in the pay stubs of Chartwells' employees but rather, DCPS explained that it would create separate documentation for the former food service employees to reflect their accrued DCPS sick leave

and keep a running log of the sick leave used by these employees. In the interim, when requested to do so by the Union, DCPS continued to pay sick leave to former DCPS employees who worked for Chartwells.

(Complaint at p. 5).

Respondent admits:

the allegations presented in paragraph thirteen of the Complaint insofar as it admits that it continued to attempt to resolve the issue of the accumulated sick leave amicably and in good faith. To this end, Respondent asserts that it made arrangements to begin honoring the accumulated sick leave of certain food service worker bargaining unit members on a case-by-case basis, provided that such employees had already exhausted any sick leave that they had earned while employed by Chartwells. Respondent further asserts that when it recognized that the obligation was of a continuing nature for an indefinite time and amount and that such a commitment would cause it to run afoul of federal and District Anti-Deficiency obligations, and that it required prior Congressional approval, it indicated to the Union that it could not legally honor such a commitment, assuming *arguendo* that there was one.

(Answer at pgs. 5-6).

The Union contends that “[t]hroughout 2009 and into 2010, DCPS continuously and repeatedly honored requests made by the Union on behalf of its members that former DCPS food service workers employed by Chartwells be allowed to access their accrued DCPS sick leave.” (Complaint at pgs 5-6).

DCPS adds:

that it continued to attempt to resolve the issue of the accumulated sick leave with the Union amicably and in good faith. To this end, Respondent asserts that it began honoring the accumulated sick leave of certain food service worker bargaining unit members on a case-by-case basis, provided that these employees had already exhausted any sick leave that they had earned while employed by Chartwells. Respondent further asserts that when it recognized that the commitment being sought was of a continuing nature for an indefinite time and amount and

that such an obligation would cause it to run afoul of federal and District Anti-Deficiency laws and regulations and that prior Congressional appropriation would be required, it indicated to the Union that it could not legally honor such a commitment, assuming *arguendo* that there was one.

(Answer at p. 6).

Lastly, the Union alleges that “[s]ubsequently, in or about November, 2010, DCPS informed the Union, for the first time, that it would no longer allow former DCPS food service workers to access their accrued sick leave while working for Chartwells.” (Complaint at p. 6). DCPS denies as much, and asserts:

that on or by October 31, 2010, it verbally communicated its position to the Union through counsel for the Union, Mark Murphy, Esq. Respondent asserts that it communicated to the Union's counsel that the commitment the Union was seeking was of a continuing nature for an indefinite time and amount and that such a commitment would cause it to run afoul of federal and District Anti-Deficiency obligations. Respondent further asserts that such a commitment required prior Congressional appropriation which had not occurred. Respondent indicated to the Union's counsel that for all these reasons it could not legally honor such a commitment, assuming *arguendo* that there was one. Respondent further asserts that its letter to the Union through its counsel, Mark Murphy, Esq. dated November 2, 2010, merely memorialized the prior verbal communication. All the remaining allegations presented in paragraph fifteen of the Complaint are denied in their entirety.

The refusal by DCPS to honor its agreement to allow former DCPS food service workers to access their accrued DCPS sick leave is unlawful and violates Sections 1-617.04 (a)(1) and (5) of the [CMPA] . . . Specifically, the refusal by DCPS to allow former DCPS food service workers to access their accrued DCPS sick leave constitutes a refusal to bargain in good faith with the Union. It is well settled that a parties' obligation to bargain in good faith includes not only reaching an agreement but, just as importantly, abiding by the terms of such an agreement. In this case,

DCPS repeatedly represented that it would pay former DCPS food service workers their accrued sick leave while these individuals were employed by Chartwells. DCPS also repeatedly acknowledged its obligation to do so, not only by its statements, but also by its actions. It paid accrued sick leave to former DCPS employees on numerous occasions. Thus, its current refusal to do so clearly constitutes a failure to bargain in good faith and, as such is an unfair labor practice. Moreover, such actions by DCPS and their unlawful refusal to honor their commitment to the Union and former food service workers is also a violation of Sections 1-617.04 (a) (1) and (5) because it serves to undermine the Union's role as a collective bargaining representative for the employees and renders agreements with DCPS illusory and in contravention to the statutory scheme embodied in the Comprehensive Merit Personnel Act.

(Answer at pgs. 5-6).

As a defense to the Complaint, DCPS asserts:

that under District of Columbia and federal anti-deficiency laws, DCPS cannot make any financial commitment that is indefinite in amount or that would entail a payment of money before funding for the commitment has been appropriated in a budget approved by Congress. The commitment that the Union seeks to impose upon Respondent is precisely such an obligation that would necessarily cause DCPS to run afoul of District and federal laws and regulations in that it is indefinite in time and amount. Similarly, the commitment, assuming *arguendo* that there is one, had not been appropriated by Congress prior to its assertion by the Union. Accordingly, these claims must be dismissed.

(Answer at pgs. 7-8).

In addition, DCPS argues as an affirmative defense, that:

any purported verbal or written contractual obligation making a commitment in violation of the proscriptions outlined in the Second Affirmative Defense is void *ab initio* under District law. No employee of DCPS has or had

any authority actual or apparent to supersede the requirements of District or federal Anti-Deficiency law or regulations nor of prior Congressional appropriation. Accordingly, these claims must be dismissed.

(Answer at p. 8).

Lastly, DCPS argues that as an affirmative defense, that:

Sick leave was a negotiated benefit and any alleged violation of a negotiated benefit would constitute a violation of contract. Contractual violations are not per se unfair labor practices cognizable by PERB, but are subject to the grievance and arbitration provisions of the parties' relevant collective bargaining agreement. Accordingly, these claims must be dismissed.

(Answer at p. 8).

Motion to Dismiss

While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. 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 24*, 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." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). Furthermore, when considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995).

"The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American*

Federation of Government Employees, Local 2741, AFL-CIO, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

In the present case, the Union's Complaint alleges violations of D.C. Code § 1-617.04(a)(1) and (5). D.C. Code §1-617.04(a)(1) (2001 ed.), provides that "[t]he District, its agents and representatives are prohibited from: . . . [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]"¹ D.C. Code § 1-617.04(a)(5) provides that "[r]efusing to bargain collectively in good faith with the exclusive representative" is a violation of the CMPA.² Specifically, Complainant alleges that DCPS violated the CMPA by refusing to bargain in good faith and attempting to undermine the Union as the bargaining representative for the food service workers. The Board finds that the Complainant has pled allegations that, if proven, would constitute a violation of the CMPA. However, it is clear that the parties disagree with respect to numerous facts in this case. Specifically, the parties' dispute the nature and substance of the negotiations that took place throughout the period at issue. On the record before the Board, establishing the existence of the alleged unfair labor practice violations requires the assessment of evidence and credibility determinations about conflicting allegations. As a result, the Board declines to make a decision based on these pleadings alone.³

Board Rule 520.10 - Board Decision on the Pleadings, provides that: "[i]f 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 argument." Consistent with that rule, we find that the circumstances presented do not warrant a decision on the pleadings. Specifically, the issue of whether the Respondents' actions rise to the level of violations of the CMPA is a matter best determined after the

¹ "Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing . . . ; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]" *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

² 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.

³ In cases such as this, the Board has found that a motion to dismiss is not appropriate. 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).

establishment of a factual record, through an unfair labor practice hearing. Consequently, the Motion to Dismiss is denied and the Board directs that this matter continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public Schools' motion to dismiss is denied.
2. The Board's Executive Director shall refer the Teamsters Local Union No. 639, International Brotherhood of Teamsters' Unfair Labor Practice Complaint 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.
4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
5. 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.

February 23, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 11-U-10, Slip Opinion No. 1266 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 9th day of May, 2012.

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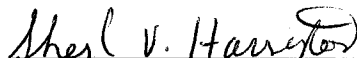
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