Government of the District of Columbia
Pubic Employee Relations Board

American Federation of Government Employees, AFL-CIO, Local 383, Complainant,	PERB Case No. 09-U-04
v.	Opinion No. 957
District of Columbia Department of Youth Rehabilitation Services, and District of Columbia Office of Labor Relations and Collective Bargaining, Respondents.	Motion For Preliminary Relief

DECISION AND ORDER

I. Statement of the Case:

On November 1, 2008, the American Federation of Government Employees, AFL-CIO, Local 383, ("AFGE", "Union" or "Complainant") filed a document styled "Unfair Labor Practice Complaint and Request for Preliminary Relief and Temporary Restraining Order" against the District of Columbia Department of Youth Rehabilitation Services ("DYRS" or "Respondents") and the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB" or "Respondents").[1] The Complainant alleges that DYRS and OLRCB have violated D.C. Code §1-617.04(a)(1), (2) and (5)[2] by, *"inter alia*, refusing to bargain with the Union regarding DYRS'

[1] Collectively DYRS and OLRCB are referred to as "Respondents".

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

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

(1) Interfering, restraining, or coercing any this

unilateral decision to eliminate AFGE's current office space; and DYRS' refusal through OLRCB, to provide the Union with any office space whatsoever." (Compl. At p. 2).

AFGE is requesting that the Board: (a) grant its request for preliminary relief; (b) order Respondents to cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (c) order Respondents to "maintain the *status quo* until DYRS and OLRCB satisfy their bargaining obligations under the CMPA, or if no preliminary relief or temporary restraining order is granted, return to the *status quo ante* until DYRS and OLRCB satisfy their bargaining obligations" (Compl. at p. 5); (d) order Respondents to post a notice advising bargaining unit members that it violated the law; and (e) grant its request for reasonable costs. (See Compl. at p. 5).

On November 17, 2008, OLRCB (on behalf of DYRS) filed a document styled "Motion to Dismiss Request for Preliminary Relief and Temporary Restraining Order" ("Opposition"). In addition, on November 24, 2008, OLRCB filed an answer to the unfair labor practice complaint ("Answer"). In their submissions, OLRCB denies that Respondents have violated the CMPA. Also, OLRCB has requested that AFGE's request for preliminary relief ("Motion") be dismissed. (See Opposition at p. 6). AFGE's Motion and OLRCB's Opposition are before the Board for disposition.

II. Discussion:

"John Walker (WALKER) is the president of the Union, and in this capacity is inter alia responsible for representing members of the DYRS bargaining unit for which the Union is certified as the exclusive representative." (Compl. at pgs. 2-3). AFGE contends that "[s]ince approximately 2003, and with the knowledge and consent of DYRS, the Union has occupied office space at 450 H Street, N.W., Washington, D.C. 20001. 450 H Street is, and has been at all times relevant to this

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> employee in the exercise of the rights guaranteed by this subchapter;
> (2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay
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> * * *
>
> (5) Refusing to bargain collectively in good faith with the exclusive representative.

complaint, a DYRS controlled location. [Furthermore, AFGE claims that] [w]ith DYRS' knowledge, the Union has continuously occupied some form of Union office at 450 H Street and at prior DYRS locations, and that has been reserved for the Union's use." (Compl. at p. 3).

"On or about September 26, 2008, DYRS separated WALKER from DYRS employment pursuant to [a] reduction in force [("RIF")]. Despite this separation, WALKER remains the Union President. Following WALKER's RIF separation, and on or about October 23, 2008, DYRS notified WALKER that he would have to vacate the Union office as well as remove all Union materials from the Union office. . . . The Union immediately objected to this proposed elimination." (Compl. at p. 3).

AFGE claims that "[o]n or about October 29, 2008, Darlene DesJardins (DESJARDINS) of the AFGE National Office, Field Services Department, spoke by telephone with OLRCB attorney and DYRS representative Dean Aqui (AQUI). On behalf of the Union, DESJARDINS demanded that the Agency reconsider its position regarding the elimination of the [AFGE] office space because the Union's continuing right to maintain office space was separate and apart from WALKER's September 2008 termination by the Agency. DESJARDINS also informed AQUI that the directive to vacate the office space by October 31, 2008 was unacceptable, additional time was required, and that the Agency was expected to provide comparable office space for the Union subsequent to the completion of necessary bargaining. Also on or about October 29, 2008, AQUI granted the Union until November 13, 2008 to vacate the Union office, but indicated that DYRS would not bargain regarding office space, and that the Union was not entitled to office space.". . . (Compl. at pgs. 3-4).

"The Union contends that by [the] conduct described above DYRS and OLRCB are in violation of the CMPA." (Compl. at p. 4). Specifically, AFGE asserts that the Respondents have violated D.C. Code § 1-617.04(a)(1),(2) and (5) by: (a) refusing to bargain with the Union regarding the provision of union office space; (b) refusing to provide the Union any office space; and (c) denying the Union's entitlement to union office space. (See Compl. at p. 4). Also, "AFGE claims that by its actions DYRS and OLRCB are interfering with the existence and administration of the Union, and are restraining employees' exercise of rights guaranteed to them by the CMPA by limiting employees' access to the Union." (Compl. at p. 4).

AFGE claims that the Respondents have violated the CMPA and that the violations are clear-cut and flagrant. (See Compl. at p. 2) As a result, AFGE is requesting that the Board grant its request for preliminary relief. In support of its position, AFGE asserts the following:

> Because the violation of the CMPA by DYRS and OLRCB in this case are clear-cut and flagrant, and will have a widespread and serious negative effect on the Union and its bargaining unit (as well as the public interest served by the Union, see D.C. Code § 1-617,01 (a)) by

> interfering with the Union's access to the bargaining unit, the Union respectfully asks that PERB order preliminary relief pursuant to PERB Rule 520.15, and that PERB seek a temporary restraining order pursuant to D.C. Code § 1-617.13(b) enjoining DYRS and OLRCB from unlawfully eliminating the Union's office space. (Compl. at p. 2).

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which 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 will be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, *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 Board Rule 520.15, this 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 judgment 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 [this] Board has determined that [the standard for exercising its discretion has been met, the [basis] for such relief [has been] 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).

In its response to the Motion, the Respondents assert that AFGE's request for preliminary relief should be denied because AFGE has failed to meet any of the elements necessary for obtaining preliminary relief. (See Opposition at pgs. 3-6). In support of its position, the Respondents assert the following:

> [I]n the instant case, the violation is neither clear-cut nor flagrant; the facts are in dispute and the alleged violation is not based on contractual obligations. In both cases the allegations stem from a single action and not a pattern of repeated and potentially illegal acts. In the instant case, the elimination of the union office is tempered by

> Deputy Director Brown's offer of a filing cabinet to store union paperwork. . . and the Agency's later agreement to provide locks for the filing cabinet. . . .
>
> With regard to the impact on the public or the widespread nature of the alleged unfair labor practice, any potential impact in this case is far less than that alleged in the DCPS cases where parents were forced to adjust to a different school day. Also, the impact on the Union is limited because DYRS referred Mr. Walker to Denise Durham "to schedule the use of a conference room or other appropriate space" to conduct union business. . . . With this factual background it would be difficult to conclude that DYRS' actions undermined public confidence in its ability to comply with the CMPA. Finally, . . .Complainant has presented no evidence to show that the Board's processes would be compromised or that eventual remedies would be inadequate if preliminary relief were not granted.

(Opposition at pgs. 5-6).

In addition, DYRS disputes the material elements of the allegations asserted in the Motion. As a result, DYRS contends that preliminary relief should not be granted. (See Opposition at pgs.3-4). Specifically, Respondents assert the following:

> Paragraph 12 of the Complaint contains the statement that "AQUI... indicated that DYRS would not bargain regarding office space." This statement is allegedly found in Exhibit 2 (sic)[3] to the complaint. However, a close reading of Exhibit B along with other correspondence refutes the allegation that DYRS refused to bargain about union office space. It would appear that the Union is finding this refusal to bargain over office space in the following language found in the last paragraph of Exhibit B.
>
> > You stated that the Union was entitled to office space. However, this position is not supported by the Union contract. If a practice is deemed to have developed, management terminated that practice at least in November 2007, a year ago.

[3] The exhibit is identified as Exhibit B.

> This language and no other language in Exhibit B can be construed to be a refusal to engage in bargaining. This language merely notes that the collective bargaining agreement does not obligate management to provide office space and that Management informed the Union of its need for the space formerly used to house union records. Nowhere in Exhibit B does Mr. Aqui say that DYRS, through its representative Ms. Allen-Williams, reiterated its commitment to "continue to bargain, as stated in our first meeting." . . . Since the alleged refusal to bargain is at the core of the Complaint and Motion for Preliminary Relief, and since such a refusal is disputed, this motion should be dismissed. (Opposition at pgs. 3-4).

In view of the above, DYRS requests that the Board: (1) find that it has not refused to bargain over office space; and (2) deny AFGE's request for preliminary relief. (See Opposition at p. 6).

After reviewing the parties' pleading it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met. In cases such as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporation,* 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, AFGEs claim that DYRS actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of DYRS' actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DYRS' actions presumably affect WALKER and other bargaining unit members. However, DYRS' actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMPA prohibits the District, its agents and representatives from engaging in unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, AFGE has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

We conclude that AFGE has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite*

relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to AFGE following a full hearing. In view of the above, we deny AFGE's motion for preliminary relief.

For the reasons discussed above, we: (1) deny AFGE's request for preliminary relief; and (2) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 383's Motion for Preliminary Relief, is denied.

2. The Board's Executive Director shall refer the Complaint to a Hearing Examiner for disposition. Pursuant to Board Rule 550.4 the Notice of Hearing shall be issued fifteen (15) days prior to the date of the hearing.

3. 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.

August 27, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-04 was transmitted via Fax and U.S. Mail to the following parties on this the 27th day of August 2009.

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