Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
	)	
	)	
American Federation of State, County and Municipal Employees, 1199 Metropolitan District, D.C.; National Union of Hospital and Health Care Employees, Local 3758 and Local 2095; AFL-CIO; and American Federation of Government Employees, Local 383, AFL-CIO,	)	PERB Case No. 07-U-41
	)	Slip Op. No. 934
Petitioner,	)	
and	)	
	)	
District of Columbia Department of Mental Health,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

I. Statement of the Case:

The American Federation of State, County and Municipal Employees, 1199 Metropolitan District, D.C.; National Union of Hospital and Health Care Employees, Locals 3758 and 2095; AFL-CIO; and the American Federation of Government Employees, Local 383, AFL-CIO, ("Complainants" or "Unions"), filed an unfair labor practice complaint and a motion for decision on the pleadings against the District of Columbia Department of Mental Health ("Respondent" or "DMH"). The Unions assert that DMH has violated the Comprehensive Merit Personnel Act ("CMPA"), as codified under D.C. Code § 1-617.04(a)(1) and (5) by failing to: (a) bargain in good faith when it failed to provide requested information which is relevant and necessary for the Unions to properly represent DMH bargaining unit members, and (b) act on the Unions' request for "hazardous pay." (Complaint at pp. 1-2).

DMH filed a document styled "Respondent Department of Mental Health Answer and Affirmative Defenses to Complainants' Unfair Labor Practice Complaint."[1] In their submission, DMH denies that it has violated the CMPA and contends that the Complainants have not stated a claim upon which relief may be granted. (*Id.* at p. 7).

The Unions' complaint and motion and DMH's answer to the complaint are before the Board for disposition.

II. Discussion

The Unions contend that by letter dated April 11, 2007, addressed to DMH's Director of Human Resources, the Unions requested that DMH implement "hazardous pay" for employees in the following bargaining unit positions: (1) Mental Health Counselors, (2) Mental Health Specialists, (3) Psychologists, (4) Psychiatric Nursing Assistants, (5) Forensic Psychiatric Technicians, (6) Psychiatric Practical Nurses, and (7) Dental Assistants. (*Id.* at p. 3). The Unions claim that they made further requests by e-mail on April 24, 2007 and April 30, 2007. The Unions assert that as of June 7, 2007, DMH had not responded to the Unions' request. (*Id.* at p. 3).

The Unions contend that on April 24, 2007, they "sent a request for information to St. Elizabeth's Hospital Director Patrick Canavan via e-mail, with copies to DMH Director of Human Resources Frankie Wheeler and DMH Director Steven Baron, regarding a Co-Occurring Disorder ('COD') Treatment Class offered to DMH staff members, including members of Locals 2095/383." (*Id.* at pp. 3-4). The Unions claim that on June 6, 2007, they repeated their request by e-mail to Dr. Canavan. (*Id.* at p. 4). The Unions assert that as of June 7, 2007, DMH had not responded to the request. (*Id.* at p. 4).

The Unions also claim that on April 26, 2007, they submitted a request for certain Equal Employment Opportunity ("EEO") information to DMH's Director of Human Resources. As of June 7, 2007, DMH had not responded to the Unions' request for EEO information. (*Id.* at p. 5). As a result, on June 8, 2007, the Unions filed a complaint alleging that DMH failed to bargain in good faith in violation of D.C. Code §1-617.04(a)(1) and (5).[2] The Unions request that the Board order DMH to produce the information requested, post a notice to its employees stating that it violated the CMPA and award the Unions reasonable costs and expenses. (*Id.* at pp. 5-6).

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[1] DMH did not file an opposition to the Unions'' Motion for a Decision on the Pleadings.

[2] D.C. Code § l-617.04(a)(l) and (5) provide as follows:

> (a) The District of Columbia, it agents, and representatives are prohibited from:
> (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
>
> * * *
>
> (5) Refusing to bargain collectively in good faith with the exclusive representative.

In its Answer to the Complaint, DMH does not dispute the factual allegations regarding their failure to provide the information concerning COD Treatment Classes and EEO, which were requested by the Unions.[3] Instead, DMH asserts the following defenses: (a) DMH "admits it has not responded in writing, specifically [to the Unions'] request [for hazardous pay] dated April 11, 2007. . . however, [DMH] contends that it is addressing an earlier request for hazardous pay"; (Answer at p. 5); and (b) DMH asserts that it has attached to its Answer to the Complaint, the information responsive to the Unions' request for information regarding COD Treatment Classes and EEO. (Answer at p. 6). Thus, DHM contends that it has provided the requested information concerning COD Treatment Classes and EEO. Therefore, DMH asserts that it has not committed an unfair labor practice.

For the above-noted reasons, DMH requests, among other things, that the Board: (1) find that DMH has not committed an unfair labor practice; (2) order the Unions to resubmit its request for "hazardous pay;" and (3) award DMH reasonable costs. (Answer at pp. 9-10).

On August 27, 2007, the Complainants filed a Motion for Judgment on the Pleadings. DMH did not file an opposition to the Unions' motion. Board 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 argument." In the present case, there is no dispute as to the facts alleged by the Unions concerning DMH's failure to provide responses to the Unions' request for information regarding COD Treatment Classes and EEO prior to the Complaint being filed. Therefore, the Board may render a decision on the pleadings concerning DMH's failure to respond to the Unions' request for information concerning COD Treatment Classes and EEO.

After reviewing the parties' pleadings, it is clear that DMH: (1) did not respond to the Unions' requests for information concerning COD Treatment Classes and EEO until after the Unions filed an unfair labor practice complaint, (2) did not articulate any viable defense regarding its failure to provide the information requested by the Unions, and (3) provided some information with its Answer, which it claims is responsive to the Unions' request.

The Board finds that the material issues of fact and supporting documentary evidence concerning the Unions' requests for information concerning COD Treatment Classes and EEO are undisputed by the parties. Thus, the allegation concerning DMH's failure to produce information before the filing of the Unions' Complaint does not turn on disputed material issues of fact but rather on a question of law. Therefore, pursuant to Board Rule 520.10, DMH's failure to produce information can appropriately be decided on the pleadings.

The 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 v. University of the District of Columbia Faculty Association*, 38 D.C. Reg. 2463, Slip Op. No. 272 at p. 4, PERB Case No. 90-U-10 (1991), we determined that "the employer's duty

[3] DMH acknowledges that as of June 7, 2007 it had not responded to the Unions' request for information regarding COD Treatment Class and EEO. (Answer at p. 6).

under the CMPA includes furnishing information that is 'both relevant and necessary to the Union's handling of [a] grievance'"[4] 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 Indus. Co.*, 385 U.S. 32, 36 (1967).

In the present case, we believe that the requested information is relevant and necessary to a legitimate collective bargaining function to be performed by the Unions, i.e., the Unions' duty to implement the terms of a collective bargaining agreement. We believe that on or about April 2007, DMH had in its possession most if not all of the information requested by the Unions. Furthermore, DMH has provided no viable explanation for not producing the information requested prior to the filing of an unfair labor practice complaint by the Unions. DMH had more than a reasonable period of time to comply with the Unions' request for information. For the reasons discussed above, we believe that DMH has failed to show any countervailing concerns which outweigh its duty to disclose the requested information.

Having reviewed this matter, we conclude that by failing and refusing to produce information and documents for which DMH did not raise any viable defense, DMH 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 v. D.C. Dep't of Mental Health*, 54 D.C. 2644, Slip Op. No. 809 at p. 7, PERB Case No. 05-U-41 (2005). In addition, the Board has 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 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." *Am. Fed'n of State, County and Mun. Employees, Local 2776 v. D.C. Dep't of Fin. & Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990). In the present case, DMH's failure to bargain in good faith with the Unions constitutes, derivatively, interference with bargaining unit employees' rights in violation of D.C. Code § l-617.04(a)(l)(2001 ed.).

As we have determined that DMH has violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case. The Unions are asking that the Board order DMH to: (1) provide the documents requested by the Union, (2) post a notice, (3) award reasonable costs, and (4) cease and desist from violating the CMPA. (Complaint at p. 5). Clearly DMH must produce the information and documents requested by the Unions.

Concerning the posting of a notice, the Board has previously "recognize[d] 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." *Nat'l Ass'n of Gov't Employees, Local R3-*

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[4] *See also Teamster, Locals 639 and 730 v. D.C. Pub. Schs.*, 37 D.C. Reg. 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and *Psychologists Union Local 3758 v. D.C. Dep't of Mental Health,* 54 D.C. Reg.. 2644, Slip Op. No. 809, PERB Case No. 05-U-41 (2005).

06 v. D.C. Water & Sewer Auth., 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Moreover, "it is the furtherance of this end, i.e., the protection of employee rights, . . . [that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violation found and the relief afforded . . . ." *Bagenstose v. D.C. Pub. Schs.*, 41 D.C. Reg. 1493, Slip Op. No. 283 at pp. 3-4, PERB Case No. 88-U-33 (1991). Therefore, bargaining unit employees who are most aware of DMH's conduct and thereby affected by it, will know that exercising their rights under the CMPA is indeed fully protected. Additionally, a notice posting requirement serves as a strong warning against future violations. For the reasons noted above, the Board grants the Unions' request that DMH be ordered to post a notice.

Further, the Unions have requested that reasonable costs be awarded. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in *AFSCME, Dist. Council 20, Local 2776 v. D.C. Dep't of Fin. & Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). 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.
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> 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] 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 pp. 4-5.

In the present case, it is clear that the Unions made a request for information in April 2007. As previously discussed, we believe that as of April 2007, DMH had in its possession most if not all of the information requested by the Unions. Notwithstanding, DMH neither provided the information requested by the Union nor articulated a viable defense or countervailing concern which outweighs its duty to disclose the requested information. Under the circumstances of this case, we believe: (1) that DMH's position was wholly without merit and (2) that a reasonably foreseeable result of DMH's conduct was the undermining of the Unions among the employees for whom it is the exclusive representative.

In view of the above, the interest-of-justice criteria articulated in the *AFSCME* case would be served by granting the Unions' request for reasonable costs in the present case. Therefore, the Board grants the Unions' request for reasonable costs. Further, the Board: (1) grants the Unions' request for a decision on the pleadings, (2) finds that DMH has violated the CMPA, (3) grants the Unions' request for reasonable costs, (4) orders DMH to cease and desist from violating the CMPA, and (5) orders DMH to post a notice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion for a Decision on the Pleadings filed by the American Federation of State, County and Municipal Employees, 1199 Metropolitan District, D.C.; National Union of Hospital and Health Care Employees (NUHHCE), Locals 3758 and 2095, AFL-CIO; and the American Federation of Government Employees (AFGE) Local 383, AFL-CIO, ("Complainants" or "Unions"), is granted in part and denied in part. Specifically, the Board grants the Unions' request for a decision on the pleadings concerning DMH's failure to produce information concerning Co-occurring Disorder Treatment Classes and Equal Employment Opportunity.

2. The Unions' request for a decision on the pleadings concerning "Hazardous Pay" is denied. The question of whether DMH's actions concerning "Hazardous Pay" constitute violations of the Comprehensive Merit Personnel Act is a matter best determined after the establishment of a factual record thorough an unfair labor practice hearing. That dispute will first be submitted to the Board's mediation program to allow the parties the opportunity to reach a settlement by negotiating with one another with the assistance of a PERB-appointed mediator.

3. The District of Columbia Department of Mental Health ("DMH"), its agents and representatives shall cease and desist from refusing to bargain in good faith with the Unions by failing to comply with the terms of the August 26, 2003 settlement agreement.

4. DMH, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII. Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.

5. The Union's request for reasonable costs is granted for the reasons stated in this Slip Opinion.

6. DMH 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 thirty (30) consecutive days.

7. Within fourteen (14) days from the issuance of this Decision and Order, DMH shall notify the Public Employees Relations Board (Board) in writing that the Notice has been posted accordingly. Also, DMH shall notify the Board of the steps it has taken to comply with paragraph 4 of this Order.

8. DMH shall pay the Unions the reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

9. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.
February 28, 2008

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-41 is being transmitted via U.S. Mail to the following parties on this the 22d day of June 2012.

Wendy L. Kahn
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U.S. MAIL

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL 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.934, PERB CASE NO. 07-U-41 (February 28, 2008).

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. 934.

WE WILL cease and desist from refusing to provide the American Federation of State, County and Municipal Employees, 1199 Metropolitan District, D.C.; National Union of Hospital and Health Care Employees, Locals 3758 and 2095; AFL-CIO; and the American Federation of Government Employees, Local 383, AFL-CIO with requested information relevant and necessary to their 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 Mental 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: 1100 4th St. SW., Suite E630, Washington, D.C. 20024. Phone: (202) 727-1822.

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