Government of the District of Columbia
Pubic Employee Relations Board

University of the District of Columbia Faculty Association/NEA, Complainant, v. University of the District of Columbia, Dr. Allen L. Sessoms, President and Mark Farley, Vice President for Human Resources and Chief Negotiator, Respondents.	PERB Case No. 09-U-26 Opinion No. 968

DECISION AND ORDER

I. Statement of the Case:

On March 9, 2009, the University of the District of Columbia Faculty Association ("UDCFA", "Union" or "Complainant") filed two documents styled "Unfair Labor Practice Complaint and Request for Preliminary Relief' and "First Amended Unfair Labor Practice Complaint and Request for Preliminary Relief', against the University of the District of Columbia, Dr. Allen L. Sessoms, President and Mark Farley, Vice President for Human Resources and Chief Negotiator ("Respondents", "University" or "UDC").[1] The Complainant alleges that UDC has violated D.C.

[1]UDCFA's complaint and amended complaint contain the same basic allegations and/or information. However, among other things, the difference between the original filing and the amended complaint include the following:

a. UDCFA's claim that UDC has refused to bargain with the "Union concerning the impact and effect of the transition to the Community College." (Amend. Compl. at p. 10.);

b. UDCFA's assertion that UDC "unilaterally distributed a revised Sixth Master Agreement deleting provisions from the negotiated Sixth Master Agreement". (Amend. Compl. at p. 1.);

Code §1-617.04(a)(1) and (5)[2] by: (a) "refusing to bargain in good faith, by subsequently engaging in coercive communication with bargaining unit faculty in an attempt to discourage membership in the Union" (Compl. at p. 2); and (b) "unilaterally distributing a revised Sixth Master Agreement deleting extensive provisions from the negotiated Sixth Master Agreement." (Amend. Compl. at p. 1).

---

c. Inclusion of e-mails from the English Department's Chair Chester Wright and Professor Harkewal Sekhon concerning whether Dean Petty solicited volunteers to teach at the community college. (See Amend. Compl. at p. 9.);

d. Copy of a March 31, 2009 memorandum sent by Mark Farley to University Faculty that included the Revised Sixth Master Agreement deleting the provisions the University asserted were not negotiable. (See Amend. Compl. at pgs. 9-10.);

e. Copy of a April 13, 2009 memorandum sent by Grae Baxter, Interim Provost and Eurmon Hervey, CEO, Community College concerning the hiring of faculty to teach at the community college. (See Amend. Compl. at p. 10.);

f. Copy of a April 13, 2009 memorandum from the School of Business Chair H.H. Makhlouf noting that "all faculty members will be evaluated for the 2008-2009 academic year." (Complainant's Exhibit 6. Also, see Amend. Compl. at p. 10.);

g. An allegation that on May 4, 2009, Dean Casciero, LRD, announced that "the Division will not be operating under the terms of the Sixth Master Agreement, but under the revised Sixth Master Agreement issued by the University on March 31, 2009 and that the faculty workload's PU system would be discontinued and that faculty would be scheduled 40 hours per week instead of 32 hours as required by the Sixth Master Agreement." (Amend. Compl. at p. 10.); and

h. An allegation that UDC violated the Sixth Master Agreement by denying faculty members sabbatical leave. In addition, UDCFA submitted a copy of a letter from President Sessoms to Professors Paul Bachman and Professor Hall denying their request for sabbatical leave. (See Amend. Compl. at pgs. 10-11 and Complainant's Exhibits 7(a) and 7(b)).

[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 employee in the exercise of the rights guaranteed by this subchapter;
> >
> > * * *
> >
> > (5) Refusing to bargain collectively in good faith with the exclusive representative.

The Union is requesting that the Board: (a) grant its request for preliminary relief "directing the University to honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02" (Compl. at p. 10); (b) order UDC to cease and desist from violating the Comprehensive Merit Personnel Act; (c) order UDC to post a notice advising bargaining unit members that it violated the law; (d) grant its request for attorney fees and reasonable costs; (e) order UDC to rescind any and all unilateral changes; and (f) grant any other remedy that the Board deems appropriate. (See Compl. at p. 11).

On March 20, 2009, UDC filed a document styled "University of the District of Columbia's Response to Request for Preliminary Relief"("Opposition") and on March 31, 2009, UDCFA filed a reply to UDC's opposition. Pursuant to Board Rule 520.6, UDC filed its Answer to the Complaint on March 30, 2009. Also, on June 12, 2009, UDC submitted a document styled "University of the District of Columbia Response to Second Request for Preliminary Relief." In their submissions UDC denies that it has violated the Comprehensive Merit Personnel Act ("CMPA"). (See Opposition at p. 2). Therefore, UDC has requested that the Union's request for preliminary relief ("Motion") be denied and the Complaint be dismissed. (See Opposition at p. 8 and Answer at p. 8). The Union's Motion and UDC's Opposition are before the Board for disposition.

II. Discussion:

On October 13, 1978, the District of Columbia Labor Board certified UDCFA as the exclusive bargaining representative of a unit of "[a]ll full-time faculty employees holding a permanent appointment from appropriated funds, including librarians/media specialists, of the University of the District of Columbia, excluding any management official, confidential employee, supervisor or employee engaged in personnel work in other than a purely clerical capacity." (Compl. at p. 2 and *UDCFA/NEA, AAVP-UDC & UDC,* Case No. 8R012, October 13, 1978). Since that time, UDC and UDCFA have been signatories to six collective bargaining agreements. (See Compl. at p. 2 and Answer at p. 2).

Pursuant to Article XXXII, Section B of the Sixth Master Agreement, negotiations for a successor agreement were initiated by UDCFA at the end of September 2007.

UDCFA submitted a proposal to UDC on October 12, 2007 which proposed opening for modification of the following Articles: VII (Association Rights); IX (Grievance and Arbitration); XI (Disciplinary/Adverse Action); XVIII (Compensation); XXVI (Safety and Health); and XXXII (the Duration of the Contract provision). (See Compl. at p. 3 and Answer at p. 2).

The Union claims that UDC's counter-proposal submitted to UDCFA on November 1, 2007, consisted of a red-lined copy of the Union's proposal and responded to each of the Union's proposed changes by either proposing to retain the current language or by noting that the change should be deleted. In addition, UDC proposed opening Article VI (Definitions), Article XIV (University Tenure), and Article XVI (Promotion Procedures). (See Compl. at p. 3).

The first bargaining session was held on November 7, 2007. (See Compl. at p. 3 and Answer at p. 3). On May 6, 2008, UDCFA filed a Declaration of Impasse with the Board. (See PERB Case No. 08-I-08). The Board's Executive Director determined that the parties were at impasse and appointed a mediator.

The parties met in mediation sessions on October 6, 14, and 20 without resolving any outstanding issue. UDCFA claims that "[a]t the beginning of the [next] session on [November 6,] the parties signed off on the previously agreed to changes to the articles on Association Rights, Discipline/Discharge, Safety/Health, Grievance/Arbitration, and Duration. The parties then moved to discussion of the University's proposed changes to the Promotion Procedures article. At the session on November 7, agreement was reached on the article on Promotion Procedures." (Compl. at p. 6).

At mediation sessions on November 18 and 20, the parties' proposed changes to the Workload article were discussed. UDCFA states that "[a]t the end of the meeting, the University proposed that the Sixth Master Agreement Workload article be carried forward unchanged into the Seventh Master Agreement. The [Union] agreed." (Compl. at p. 6).

UDCFA contends that "the Evaluation Procedures article was the basis for discussions in mediation sessions on December 4, 5, and 17 without movement by either party. [Also, UDCFA argues that it] continued to maintain its position that the procedure in the Sixth Master Agreement was flawed and that a return to the prior procedure was appropriate. [However, UDCFA claims that UDC] maintained its position that while there were some changes needed to the procedure in the Sixth Master Agreement, they were unwilling to move back to an old procedure." (Compl. at p. 6).

At the end of the mediation session on December 17, the mediator asked UDCFA to present a red-line version of their Evaluation procedure. (See Compl. at p. 7 and Answer at p. 6). On January 12, UDCFA presented a revised proposal that was essentially the Sixth Master Agreement procedure with three (3) minor changes. (See Compl. at p. 7 and Answer at p. 6).

UDCFA asserts that by letter dated January 13, 2009, UDC stated that the University had determined that provisions of the Sixth Master Agreement were either prohibited or permissive subjects of collective bargaining and that UDC would assert that these provisions were no longer in effect in the Sixth Master Agreement. (See Compl. at p. 7).

UDCFA contends that the January 13th letter also stated that the "prohibited or permissive" subjects "have been removed from the [Sixth Master] Agreement" and would "no longer be subject to negotiation except to the extent that they impact on Mandatory Subjects." (Compl. at p. 8).

A mediation session was held on January 14, 2009. During that session the parties discussed UDCFA's Evaluation proposal and the University's January 13, 2009 letter. (See Compl. at p. 8 and Answer at p. 6) . UDCFA contends that at the January 14, 2009 meeting the mediator stated she was informing the Board that the mediation process was concluded without resolution of all outstanding issues. (See Compl. at p. 8).

UDCFA claims that on January 15th , bargaining unit members began to receive at their home address a restatement of the January 13th letter which was addressed to "Faculty Members." (Compl. at p. 8). Furthermore, UDCFA contends that on February 19, 2009, Dean Rachel Petty informed the faculty of the English Department that "[f]aculty do not have tenure." (Compl. at p. 8).

UDCFA argues that at a February 19th meeting, Dean Petty also asked bargaining unit members to volunteer to teach at UDC's proposed community college "without stating whether the Sixth Master Agreement would apply at the community college, or, if not, what terms and conditions of bargaining would apply." (Compl. at p. 9).

UDCFA claims that on "February 20, 2009, UDC submitted its list of allegedly non-negotiable issues and stated that they were no longer in effect in the Sixth Master Agreement. In this letter, the University declared non-negotiable contract provisions which had not been reopened in the negotiations. . .". (Compl. at p. 9).

Also, UDCFA asserts that UDC "has not paid the merit pay or bonus required by the Sixth Master Agreement[,] [and] has not explained whether this is merely a breach of contract or is based on some theory that the merit pay and bonus provisions of the Sixth Master Agreement are non-negotiable and void." (Compl. at p. 9).

In addition, the Union claims that UDC failed to act timely on faculty promotions and consistently violated the provisions of Article XVI of the Sixth Master Agreement. (See Compl. at p. 9). UDCFA contends there were irregularities and procedural violations. (See Compl. at p. 9). Specifically, the Union asserts that the "Sessoms administration has attempted to apply a new promotion standard that was not in existence at the time when faculty members applied for promotion under the Sixth Master Agreement. The University has not explained whether this is merely a breach

of contract or is based on some theory that the promotion provisions of the Sixth Master Agreement are non-negotiable and void." (Compl. at p. 9).

In view of the above, UDCFA asserts that UDC has violated D.C. Code §1-617.4(a)(1) and (5) by the following acts:

a. bargaining in bad faith by submitting a declaration of non-negotiability on February 20 which declared non-negotiable issues upon which the parties had either already reached agreement or had agreed to retain from the Sixth Master Agreement;

b. bargaining in bad faith by submitting a declaration of non-negotiability on February 20, after the parties had completed mediation and then declaring that all issues would be referred to interest arbitration;

c. bargaining in bad faith by declaring on January 13 and February 20, 2009 that provisions of the Sixth Master Agreement were no longer in force because they were non-negotiable;

d. bargaining in bad faith by telling faculty in the English Department that faculty no longer had tenure;

e. bargaining in bad faith by making unilateral changes in mandatory subjects of bargaining while the parties are negotiating the terms of the Seventh Master Agreement;

f. bargaining in bad faith by "removing" allegedly prohibited or permissive terms from the Sixth Master Agreement, which remains in effect pending the negotiation of the Seventh Master Agreement;

g. bargaining in bad faith by asking faculty members to teach at the community college before negotiating with the UDCFA over applicable terms and conditions of employment at the community college;

h. refusing to bargain with the Union concerning the impact and effect of the transition to the community college;

i. engaging in coercive communication with bargaining unit members; and

j unilaterally distributing a revised Sixth Master Agreement to bargaining unit members.

(See Compl. at p. 10 and Amend. Compl. at p. 1).

The Union is requesting that the Board grant its request for preliminary relief. In support of its position, the Union asserts the following:

> The University's violations of D.C. Code §1-617.4(a)(5) and (1) adversely affect every member of the bargaining unit. The conduct is clear-cut and flagrant. The material facts concerning the distribution of material to the faculty and the contents of that material is undisputed. The violations are widespread, affecting every bargaining unit employee. The public interest is seriously affected. PERB's processes are being interfered with such that PERB's ultimate remedy may be clearly inadequate. (Amend. Compl. at p. 13).
>
> To remedy these violations, PERB should issue preliminary relief directing the University to honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02. *Teamsters Locals 639 and 730 v. District of Columbia,* 631 A2d 1205 (D.C. 1993); *on remand,* Misc. 419-89 (Super. Ct. 2000); *AFGE Local 631 and District of Columbia Water and Sewer Authority*, PERB Case No. 05-N--02, Opinion No. 877, 54 DCR 3210 (2007); D.C. Code Section 1-617.17(f)(4). (Compl. at p. 11 and Amend. Compl. at p. 13).

In its response to the Motion, UDC asserts that UDCFA's request for preliminary relief should be denied because UDCFA has failed to meet any of the elements necessary for obtaining preliminary relief. (See UDC's Opposition at p. 4). Specifically, UDC claims that: (1) it has not

violated the CMPA; and (2) UDCFA has failed to satisfy the requirements for preliminary relief. In support of its position, UDC asserts the following:

> The University denies engaging in any unfair labor practice. In fact, it is within the University's management rights to *declare* certain provisions of the expired Sixth Master Agreement non-negotiable while a successor agreement is being negotiated. (Emphasis in original). (UDC's *Opposition to the* Second Request for Preli. Relief at p. 3).
>
> The new and additional allegations contained within the Amended Unfair Labor Practice Complaint and Dr. El-Khawas' Affidavit relate exclusively to the University's actions in communicating its decisions regarding its non-negotiability declarations and taking some action to implement those decisions.[3] (UDC's Opposition to the Second Request for Preli. Relief at p. 4).
>
> Thus, there are no new distinct allegations, but rather allegations that directly stem from the University's initial declaration of non-negotiability. *Id.*

After reviewing the parties' pleadings, it is clear that: (a) the parties are engaged in negotiations for a successor agreement to the Sixth Master Agreement; (b) UDC has notified both UDCFA and bargaining unit members that "prohibited and permissive subjects of bargaining will be treated as if they have been removed from the Sixth Master Agreement";[4] (c) UDC has stated that it "will maintain the *status quo* on all Mandatory Subjects until such time as [the parties'] efforts result in a successor agreement"[5] (emphasis added); and (d) UDC has advised faculty members that "the items removed from the 6th Master Agreement (prohibited or permissive) will no longer be

---

[3]UDC "disputes that the new allegations contained in the amended complaint - paragraphs 33 through 39 of the Amended Complaint and paragraphs 20 through 25 of Dr. El-Khawa's Affidavit are true and correct in all respects. UDC requests that the Board dismiss the Motion without reaching the issue of whether these allegations are true in all respects. Furthermore, UDC argues that assuming *arguendo* that they are relevant, in whole or in part, their accuracy should be determined after the Board receives testimony subject to cross-examination." (UDC's Opposition to the Second Request for Prel. Relief at p. 4, n. 1).

[4] See January 15, 2009 memorandum sent to faculty members by UDC's Office of Human Resources and the Office of the General Counsel, at p. 2.

[5] *Id.*

subject to grievance or arbitration".[6] In view of the above, we believe that the material issues of fact and supporting documentary evidence concerning UDC's failure to maintain the *status quo* until such time as the parties' efforts result in a successor agreement, are undisputed by the parties.

Thus, the allegations concerning UDC's failure to maintain the *status quo*, does not turn on disputed material issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10[7], UDC's failure to maintain the *status quo* can appropriately be decided on the pleadings.

In the present case, UDC does not dispute the factual allegations concerning its failure to maintain the *status quo*. Nonetheless, UDC claims that it has not violated the CMPA. Specifically, UDC asserts that: "[i]t is within the University's management rights to declare certain provisions of the expired Sixth Master Agreement non-negotiable while a successor agreement is being negotiated . . . [a]nd the University is not required in the interim to wait until . . . PERB renders a decision on the merits." (UDC's Opposition to the Second Request for Prelim. Relief at p. 3). In addition, in a January 13, 2009 memorandum sent to faculty members UDC notes that the CMPA was amended in 2005 and that pursuant to this amendment UDC is not required to negotiate over "sole management rights." (See January 15, 2009 memorandum sent to faculty members by UDC's Office of Human Resources and the Office of the General Counsel, at pgs. 1-2). As a result, UDC suggests that pursuant to Article XXXI (Savings Clause) of the parties' CBA, the permissive subjects contained in the Sixth Master Agreement are void.[8]

---

[6] *Id.*

[7] 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 arguments.

[8] Article XXXI (Savings Clause) of the parties' CBA states that:

> In the event that any provision of this Agreement is found to be inconsistent with existing laws, the provision of such laws shall prevail; and if any provision herein is determined to be invalid and unenforceable by a court or other authority having jurisdiction, such provision shall be considered void, but all other valid provisions herein shall remain in full force and effect. Should any provision of this Agreement be rendered or declared invalid by reason of any existing or subsequently enacted legislation or by decree of a court or administrative agency of competent jurisdiction, such invalidation shall not affect any other part or provision herein.
>
> No later than sixty (60) days after a written request by either party, negotiations regarding a substitute provision(s) for the invalidated provision(s) shall commence.

The Union counters that "[w]hether the University is correct regarding its non-negotiability declaration for negotiation of the Seventh Master Agreement . . . management may not repudiate any previous agreement concerning management rights. ..." (Complainant's Reply to UDC's Opposition to Request for Prel. Relief at pgs. 1-2).

The Board has previously considered the issue of whether management must maintain the *status quo* after expiration of the parties' collective bargaining agreement ("CBA"). In *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*, 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 84-U-15 and 85-U-01 (1984), the Board considered the "question of whether the District of Columbia, as Employer, may cancel, when a collective bargaining agreement expires, employee dental and optical insurance coverage established under the agreement." The Board determined that the District could not cancel dental and optical insurance coverage when the parties' CBA expired. In reaching this determination, the Board noted that:

> The position taken here by the unions has been upheld consistently and without discovered exception by the National Labor Relations Board (applying the terms of Section 8(a)(5) of the National Labor Relations Act, which are virtually identical with those of Section 1-618.4(a)(5)[9] of the D.C. Code), by other public employment boards (also administering similar statutory provisions), by the federal district courts and courts of appeal, and by the Supreme Court of the United States. The conclusion which has been reached is dictated clearly by the letter of the law and equally by the practicalities of responsible collective bargaining.
>
> An extended line of cases applies this same principle to situations, paralleling exactly the facts of the present case, in which the employer canceled insurance plans of one kind or another while negotiations for a new collective bargaining agreement were in progress. The holdings have been, consistently, that such action violates the duty-to-bargain provisions in the National Labor Relations Act and in virtually all state public employment statutes. *Hinson v. NLRB*, 428 F(2d) 133 (8th Circuit, 1970); *In re Cumberland School District*, 100 LRRM 2059 (Pa. Supreme Ct., 1978); *cf. Borden, Inc., v. NLRB*, 196 NLRB 172 (1972).

[9]Now codified at D.C. Code §1-617.04(a)(5) (2001 ed.).

> The good sense underlying this uniform body of precedent is plain. If employers were entitled to make unilateral changes in existing wage rates or *other terms and conditions of employment where an agreement expires and while a new one is being negotiated, it would invite unrestrained coercive action by the employers and inevitable retaliatory and disruptive action by unions.* The statutory prohibition on coercive action and the statutory duty to bargain collectively aboutchanges in established wage rates and other terms and conditions of employment are designed specifically to prevent this kind of chaos. *They have special point in public employment situations, in which strikes or similar employee action are prohibited.*
>
> The employer's contention here that this general rule becomes inapplicable if the contract places a termination date on specific terms of the agreement misconceives the basis of the rule. *The obligation to continue the established terms and conditions of employment flows from the statute, not from the terms of the agreement.* (Emphasis added). (Slip Op. No. 94 at p. 3).

Consistent with our holding in the *FOP* case, we find that UDC must maintain the *status quo* concerning the terms and conditions of employment contained in the Sixth Master Agreement until the parties negotiate a successor agreement.

Also, UDC claims that the 2005 amendment to the CMPA supports its claim that permissive subjects of bargaining do not survive the expiration of the parties' CBA. On April 13, 2005, the CMPA was amended at D.C. Code §1-617.08(a-1) (Supp. 2005). The following language was added at subsection (a-1):

> *(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section. (*Emphasis added).

In *District of Columbia Fire and Emergency Medical Service Department and American Federation of Government Employees, Local 3721,* 54 DCR 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007), the Board considered one of the first negotiability appeals filed after the April 2005 amendment. In that case the Board stated "that at first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code §1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in §1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the

Board indicated] that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment." Slip Op. No. 874 at p. 8.

The Board noted that "[t] he section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, stated as follows:

> Section 2(b) also protects management rights generally by providing that no 'act, exercise, or agreement' by management will constitute a more general waiver of a management right. *This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.* (emphasis added)." Slip Op. No. 874 at p. 8.

After reviewing the legislative history of the 2005 amendment, the Board observed that under the 2005 amendment:

> (2) *management may not repudiate any previous agreement concerning management rights* during the term of the agreement; (emphasis added). Slip Op. No. 874 at p. 8.

In view of the above, we find that the legislative history concerning the 2005 amendment to the CMPA, does not support UDC's claim that permissive subjects of bargaining do not survive the expiration of the parties' CBA. Therefore, we find that UDC's argument lacks merit.

For the reasons discussed, we find that UDC's "action was patently coercive in violation of Section 1-[617.04] (a) (1) of the D.C. Code. Changing the existing employment terms unilaterally during the renegotiation period is plainly a refusal to bargain collectively in good faith under Section 1-[617.04] (a) (5)."[10] *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor*

---

[10]In *American Federation of* State, County *and Municipal Employees, Local 2776 v. D.C. Department of Finance and Revenue,* 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990) we 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." Also see, *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1999); *Committee on Interns and Residents v. D.C. General*

Relations and Collective Bargaining, 31 DCR 6208, Slip Op. No. 94 at p. 6, PERB Case Nos. 84-U-15 and 85-U-01 (1984), In view of the above, it is unnecessary to examine further or determine whether UDC's action is also a violation of the *status quo* provision of D.C. Code§1-617.17 (f) (4).[11]

Under the facts of this case, we find that UDC's failure to maintain the *status quo* with respect to working conditions and terms of employment, constitutes a violation of the CMPA. However, we would like to make it clear that our ruling does not concern the issue of whether UDC is correct regarding its non-negotiability declaration concerning negotiations for the Seventh Master Agreement. The negotiability issues raised concerning the current negotiations for a successor agreement, will be addressed by the Board when it considers PERB Case No. 09-N-02.

Next, we will consider UDCFA's request for preliminary relief regarding the remaining allegations. It is clear from the pleadings that the parties disagree on the facts concerning UDC's alleged: (1) failure to engage in impact and effect bargaining; (2) coercive communication; (3) direct dealing with bargaining unit members; and (4) failure to bargain in good faith concerning the successor agreement. These remaining alleged unfair labor practice violations turn essentially on making credibility determinations on the basis of conflicting allegations. We can not do so on the 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 with respect to these allegations.[12] In cases such

---

Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1996)..

[11] UDCFA also contends that the UDC's action is in violation of D.C. Code§ 1-617.17(f)(4). (See Complainant's Rely to Respondent's Opposition to Request for Prel. Relief at p. 2). Specifically, UDCFA suggests that since it has been determined that the parties are at impasse concerning negotiation for a successor Seventh Master Agreement, UDC must maintain the *status quo*. After setting out rules for collective bargaining negotiations, in paragraph (1), (2) and (3), subsection (f) provides:

> (4) If the procedures set forth in paragraph (1), (2) or (3) of this subsection are implemented, *no change in the status quo shall be made pending the completion of mediation and arbitration, or both.*

[12] UDCFA's claim that UDC's action meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint and Amended Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of UDC's actions (with respect to these remaining allegations) constitute clear-cut flagrant violations, or have any deleterious effects the power of preliminary relief is intended to counterbalance. UDC's actions presumably affect bargaining unit members. However, UDC's 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, UDCFA has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be

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 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, UDCFA's claim that UDC's actions concerning the remaining allegations meet the criteria of Board Rule 520.15, is a repetition of the allegations contained in the Complaint. Even if the remaining allegations are ultimately found to be valid, it does not appear that any of UDC's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. UDC's actions presumably affect bargaining unit members. However, UDC's actions stem from a single action (or at least a single series of 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, UDCFA 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 UDCFA has failed to provide evidence which demonstrates that the remaining allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found (concerning the remaining allegations) in the present case, the relief requested can be accorded with no real prejudice to UDCFA following a full hearing.

For the reasons discussed above, we deny UDCFA's request for preliminary relief concerning UDC's alleged: (1) failure to engage in impact and effect bargaining; (2) coercive communication; (3) direct dealing with bargaining unit members; and (4) failure to bargain in good faith concerning the successor agreement. Therefore, with respect to these remaining allegations, we direct the development of a factual record through an unfair labor practice hearing.

Since we have determined that UDC has violated the CMPA by not maintaining the *status quo* concerning the terms and conditions of employment found in the Sixth Maser Agreement, we now turn to the issue of what is the appropriate remedy in this case.

UDCFA has requested that the Board order UDC to post a notice acknowledging that it has violated the CMPA. (See Compl. at p. 11 and Amend. Compl. at p. 12). Concerning the posting of a notice, the Board has previously noted that, "[w]e recognize that when a violation is found, the Board's order is intended to have therapeutic as well as a remedial effect. Moreover the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices, is the protection

---

inadequate, if preliminary relief is not granted.

recognize that when a violation is found, the Board's order is intended to have therapeutic as well as a 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". *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 DCR 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000). Moreover, "it is the furtherance of this end, i.e., the protection of employees rights, . . . [that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violations found and the relief afforded . . . ." *Charles Bagenstose v. D.C. Public Schools*, 41 DCR 1493, Slip Op. No. 283 at p. 3, PERB Cse No. 88-U-33 (1991). We are requiring that UDC post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of UDC's conduct and thereby affected by it, will know that exercising their rights under the CMPA is indeed fully protected. "Also, a notice posting requirement serves as a strong warning against future violations." *Wendell Cunningham v. FOP/MPD Labor Committee*, Slip Op. No. 682 at p.10, PERB Case No. 01-U-04 and 01-S-02 (2002). For the reasons noted above, we grant UDCFA's request that UDC be ordered to post a notice.

UDCFA is also asking that the Board order UDC to: (1) rescind any and all unilateral changes; (2) abide by and comply with its statutory bargaining obligation; and (3) cease and desist from violating the CMPA. (See Compl. at p. 11 and Amend. Compl. at p. 12). We grant UDCFA's request. As a result, UDC shall maintain the *status quo* concerning the terms and conditions of employment contained in the Sixth Master Agreement; (b) honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02; and (c) cease and desist from violating the Comprehensive Merit Personnel Act.

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia ("UDC"), its agents and representatives shall cease and desist from violating D.C. Code § 1-617.04 (a)(1) and (5), by the acts and conduct set forth in this Opinion.

2. UDC, its agents and representatives shall: (a) maintain the *status quo* concerning the terms and conditions of employment contained in the Sixth Master Agreement; (b) honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects

of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02; and (c) cease and desist from violating the Comprehensive Merit Personnel Act.

3. UDC, 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 VII Labor-Management Relations" of the Comprehensive Merit Personnel Act ("CMPA") to bargain collectively through representatives of their own choosing.

4. The University of the District of Columbia Faculty Association's request for preliminary relief concerning UDC's : (1) failure to engage in impact and effect bargaining; (2) alleged coercive communication; (3) direct dealing with bargaining unit members; and (4) failure to bargain in good faith concerning the successor agreement, is denied.

5. UDC 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.

6. Within fourteen (14) days from the issuance of this Decision and Order, UDC shall notify the Public Employees Relations Board ("Board"), in writing, that the Notice has been posted accordingly. Also, within fourteen (14) days from the issuance of this Decision and Order, UDC shall notify the Board of the steps it has taken to comply with paragraphs 2 and 5 of this Order.

7. The Board's Executive Director shall refer the remaining allegations concerning UDC's : (1) failure to engage in impact and effect bargaining; (2) alleged coercive communication; (3) direct dealing with bargaining unit members and (4) failure to bargain in good faith concerning the successor agreement, to a Hearing Examiner for disposition. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

8. 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.

September 30, 2009

CERTIIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 09-U-26 was served via FAX and U.S. Mail to the following parties on this the 30th day of September, 2009.

Jonathan G. Axelrod, Esq.
Beins, Axelrod, P.C.
1625 Massachusetts Ave., N.W. Suite 500
Washington, D.C. 20036

FAX & U.S. MAIL

Andrea M.Bagwell, Esq.
Assistant University Counsel
University of the District of Columbia
4200 Connecticut Avenue, N.W.
Building 39, Suite 30-L
Washington, D.C. 20008

FAX & U.S. MAIL

Courtesy Copy:

Mark Farley
Vice President for Human Resources
and Chief Negotiator
University of the District of Columbia
4200 Connecticut Avenue, N.W.
Washington, D.C. 20003

U.S. MAIL

Sheryl V. Harrington
Secretary