Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State, County and and Municipal Employees, AFL-CIO,	
Complainant,	PERB Case No. 05-U-41
	Opinion No. 816
v.	**Motion for Reconsideration**
District of Columbia Department of Mental Health,	**CORRECTED COPY**
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Department of Mental Health ("DMH" or "Respondent") filed a document styled "Motion In Partial Compliance With Order And Exception To Same" ("Motion"), in the above-captioned case. DMH is requesting that the Board modify Slip Opinion No. 809 by not requiring DMH to provide the information which is responsive to request number 9 contained in the Complainant's June 16, 2005 letter. The Psychologists Union, Local 3758 of the District of Columbia Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO ("Complainant" or "Union"), opposes the Motion. DMH's Motion and the Complainant's opposition are before the Board for disposition.

II. Discussion

In Slip Opinion No. 809, issued on September 9, 2005, the Board found that DMH violated the Comprehensive Merit Personnel Act ("CMPA"). Specifically, the Board determined that by failing and refusing to produce documents responsive to requests number 1, 2, 3, 4, 5, 6 and 9 contained in the Complainant's letter dated June 16, 2005, DMH failed to meet their statutory duty of good faith bargaining, thereby violating D.C. Code § 1-617.04(a)(5).[1] In addition, the Board held that "a violation of the [DMH's] statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitute[d] derivatively a violation of the counterpart duty not to interfere with 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. 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); Also see, University of the District of Columbia v. University of the District of Columbia Faculty Association, *supra.*" (Slip Op. No. 809 at p. 7) Therefore, the Board determined that DMH violated D.C. Code § 1-617.04(a)(1) and (5). As a remedy, the Board ordered DMH to provide the Complainant with the documents requested by the Complainant in requests number 1, 2, 3, 4, 5, 6 and 9 of the Complainant's June 16, 2005 letter. Paragraph 3 of the Board's September 9th Order directs that DMH provide those documents to the Complainant no later than fourteen (14) days from the service of the Decision and Order.

On September 22, 2005, DMH filed its Motion. In their Motion, DMH claims that it has partially complied with paragraph 3 of the Board's Order. Specifically, DMH contends that it has provided the Complainant with documents responsive to requests number 1, 2, 3, 4, 5 and 6 contained in the Complainant's letter dated June 16, 2005. However, with respect to request number 9, DMH asserts that "an exception [should] be granted given that the information requested is not 'readily available' as indicated in the Board's Order." (Motion at p. 1)

The Complainant opposes DMH's Motion on two grounds. First, the Complainant claims that

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[1]The Board referred the issue concerning whether requests number 13 and 16 are protected by the (Health Insurance Portability and Accountability Act of 1999(HIPAA), 45 CFR Part 164, to a Hearing Examiner in order to determine the relevance and application of HIPAA to the documents noted in requests number 13 and 16. In addition, the question concerning whether the scope of the information requested in requests number 10, 11, 14 and 15 is too broad or whether disclosure would put an undue burden on DMH., was also referred to a Hearing Examiner for disposition. In addition, DMH's claim that the information noted in requests number 7, 8 and 12 was not provided because it either does not exist or is not available, was referred to a Hearing Examiner for disposition. Finally, DMH's counterclaim concerning the Complainant's alleged unfair labor practice was referred to a Hearing Examiner for disposition.

pursuant to Board Rule 559.2, DMH's Motion is not timely. Second, the Complainant asserts that "this is the first time that DMH has raised its present contention as an excuse for its failure to provide the requested information. . . [Specifically, the Complainant notes that] DMH [previously] claimed the basis for refusing to provide the information responsive to request number 9 was that the 'information [had] either been previously provided and/or [was] available to the Union from other sources.'. . . [In light of the above, the Complainant asserts that DMH is] now seeking to avoid compliance with the Board's clear order to produce the information responsive to request number 9 on grounds that it has never before chosen to raise. [The Complainant claims that this] is wholly improper." (Complainant's Opposition to DMH's Motion at pgs. 2-3)

DMH responded to the Complainant's opposition by filing a document styled "Reply To Complainant's Opposition To Respondent's Motion In Partial Compliance With Order And Exception To Same." In this submission, DMH claims that "[a]lthough [it] entitled its motion as a motion in compliance and 'exception' and did not utilize the word 'reconsideration,' clearly the contents of the motion indicates that DMH is requesting that the Board reconsider its decision with respect to item 9 and grant an exception to same." (DMH's Reply To Complainant's Opposition at p. 2) In addition, DMH asserts that the Motion was filed within the ten day period required by the Board's Rules.

After reviewing DMH's Motion, we concur with DMH that its Motion is in fact a "motion for reconsideration." Having determined that DMH's submission is a "motion for reconsideration," we next must decide whether the "motion for reconsideration" was timely filed.

Board Rule 559.1, 559.2, 501.4, 501.5 and 501.16 provide as follows:

> **559.1 - Board Decision**
> The Board's Decision and Order shall become final thirty (30) days after issuance unless the order specifies otherwise.
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> **559.2 - Board Decision (cont.)**
> *The Board's Decision and Order shall not become final if any party files a motion for reconsideration within ten (10) days after issuance of the decision*, or if the Board reopens the case on its own motion within ten (10) days after issuance of the decision, unless the order specifies otherwise. (Emphasis added)
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> **501.4 - Computation - Mail Service**
> Whenever a period of time is measured from the service of a pleading and service is by mail, five (5) days shall be added to the prescribed period.

> **501.5 - Computation - Weekends and Holidays**
> *In computing any period of time prescribed by these rules, the day on which the event occurs from which time begins to run shall not be included.* If the last day of a prescribed period falls on a Saturday, Sunday or District of Columbia holiday, the period shall extend to the next business day. *If a prescribed time period is less than eleven (11) days, Saturday, Sundays, and District of Columbia holidays shall be excluded from the computation.* Whenever the prescribed time period is eleven (11) days or more, such days shall be included in the computation. (Emphasis added)
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> **501.16 - Method of Service**
> Service of pleadings shall be complete on personal delivery during business hours, depositing of the message with a telegraph company, charges prepaid, depositing the document in the United States mail, properly addressed, first class postage prepaid, or by facsimile transmission.

In the present case, the Board issued Slip Opinion No. 809 on September 9, 2005 and the opinion was served on that date to the parties by facsimile and first-class mail. Pursuant to Board Rule 559.2, 501.5 and 501.16, DMH's "motion for reconsideration" had to be filed in this case no later than the close of business on September 23, 2005.[2] DMH's "motion for reconsideration" was transmitted to the Board via facsimile on September 22, 2005. Therefore, consistent with Board Rule 559.1 and 501.5, DMH's Motion was timely filed. As a result, the Complainant's assertion that the Motion was not timely, lacks merit.

The Complainant also asserts that DMH's Motion should be denied because "this is the first time that DMH has raised its present contention as an excuse for its failure to provide the requested information." (Complainant's Opposition to DMH's Motion at p. 2) DMH countered that "[w]ith respect to the Union's contention that DMH has allegedly never raised this issue in its pleadings, it should be noted that DMH in fact objected to this particular request in its Answer to the Complaint. [In addition, DMH claims] [t]hat the fact that it would be necessary to actually prepare statements explaining the dissemination of Policy 482.1 was not identified until after the Board's order when DMH began to compile data and documentation. [DMH asserts that] [i]t is for this reason that DMH only objected to this particular item request and was able to provide greater detail with respect to its

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[2] Pursuant to Board Rule 501.5, the beginning date for computing the ten (10) day period was September 12, 2005. Therefore, the ten day period ended on September 23.

objection to the same." (DMH's Reply To Complainant's Opposition at p. 2)

Also, DMH "requests that an exception be granted given that the information requested is not 'readily available' as indicated in the Board's order." (Motion at p. 1) Specifically, DMH asserts that "to fully respond to the inquiry would require DMH to interview and prepare statements on behalf of approximately thirty (30) mangers and supervisors to determine the efforts they made to determine 'all steps' taken by each to 'ensure that staff are informed of Policy 482.1 indicating dates, materials distributed, etc.' Thus, [DMH claims that] the Board's determination that this information is 'readily available' is incorrect. . . . [Furthermore, DMH contends that] [a]s indicated in [its] original pleadings, this request is unduly burdensome insofar as the information is not readily available but must be discovered through personal interviews of approximately thirty (30) managers and supervisors [located] at nine different sites [throughout the District of Columbia], and would require the preparation of statements for each individual." (Motion at p. 2)

In request number 9 contained in the Complainant's letter dated June 16, 2005, the Complainant requested that DMH "[l]ist all steps taken by managers/supervisors of DMH to ensure that staff are informed of Policy 482.1 indicating dates, materials distributed, etc." (See Complainant's letter to DMH dated June 16, 2005). In their Answer to the Complaint, DMH did not claim that the documents which were responsive to request number 9 were not available. Instead, DMH asserted that they did not have to provide the documents which were responsive to request number 9 because that information had either been previously provided and/or was available to the Union from other sources (i.e. the District of Columbia government website, Westlaw, Lexis and DMH's intranet). Specifically, DMH asserted that "evidence of DMH's implementation of Policy #482.1 [was]. . . available on the District's website free of charge and . . . any person may access [this information] through the internet. [In addition, DMH argued that this information was] also available on the DMH intranet which was available to all DMH employees." (Answer at p. 7) Also, in a letter dated August 5, 2005 which was addressed to the Board's Executive Director, DMH indicated with respect to request number 9 that "[a]ll policies are made available via DMH intranet and each CSA site has a notebook containing policies available for employees on its premises." It is clear from both DMH's Answer to the Complaint and their August 5th letter to the Board's Executive Director, that the requested information was available (i.e. the District of Columbia government website, Westlaw, Lexis and DMH's intranet) when DMH filed their responsive pleading. In light of the above, we find that DMH never raised this issue in its pleadings. Also, DMH "requests that an exception be granted given that the information requested is not 'readily available' as indicated in the Board's order." We note that in DMH's letter dated August 5th, DMH acknowledged that the information that was responsive to request number 9 was available at minimum on both DMH's intranet and in notebooks at each CSA site. As a result, we determined in Slip Op. No. 809 that the requested information was 'readily available' to responsible DMH staff. For the reasons discussed above, we find that the arguments contained in DMH's Motion lack merit.

DMH also argues that "whether and how the policy was distributed throughout the CSA sites

by other managers that did not oversee [Dr. Bruce] is immaterial to the issue of Dr. Bruce's claim and whether or not he was aware of the policy." (Motion at p. 2) This is just a repetition of the argument raised by DMH in their answer to the unfair labor practice complaint. Furthermore, we previously considered this argument and found that the information requested by the Complainant in request number 9 was: (1) readily available to responsible DMH officials and (2) both relevant and necessary to a legitimate collective bargaining function to be performed by the Union, i.e. the investigation, preparation and processing of a grievance under the negotiated grievance procedure. (See Slip Op. No. 809 at pgs. 6-7.) Moreover, we concluded that DMH failed to show any substantial countervailing concerns which outweigh its duty to disclose the requested information. Therefore, consistent with our holding in American Federation of State, County and Municipal Employees, Council 20 v. District of Columbia General Hospital and District of Columbia Office of Labor Relations, *supra,* we concluded that DMH"s asserted defense, lacked merit. Therefore, we ordered DMH to produce the information identified in request number 9. (See Slip Op. No. 809 at p. 7) After reviewing DMH's Motion we find that there is no legitimate reason for reversing our finding that the information sought in number 9 was: (1) readily available to DMH officials and (2) both relevant and necessary to a legitimate collective bargaining function to be performed by the Union, i.e. the investigation, preparation and processing of a grievance under the negotiated grievance procedure.

Finally, DMH notes that "[s]hould the exception not be granted, DMH requests an additional thirty (30) days to conduct the necessary interviews and prepare the statements which may be responsive to [request number] 9." (DMH's Reply to Complainant's Opposition at p. 2) As noted above, DMH previously claimed that the information which is responsive to request number 9, was available on DMH's intranet, the District of Columbia government website and in notebooks at the various CSA sites. Therefore, we conclude that DMH has to produce those documents which they previously asserted were available on DMH's intranet, the District of Columbia government website and in notebooks at the various CSA sites. Also, we believe that DMH had an obligation to pursue with all due diligence this information request while we were considering their Motion. More than sixty days have elapsed since we issued Slip Op. No. 809 and DMH has failed to make a showing that despite all good faith and due diligence, during this sixty day period, they could not comply with the Board's order to produce the information which is responsive to request number 9. As a result, DMH's request for a thirty day extension concerning those documents which they previously acknowledged were available, is denied.

We note that if the sources that DMH claimed were readily available do not contain the information sought by the Union, either party may seek a ruling from the Hearing Examiner as to how to satisfy that request. However, we wish to make it clear that should either party seek a ruling from the Hearing Examiner and should the Hearing Examiner determine that DMH must take further action in order to comply with the scope of information sought in request number 9, the Hearing Examiner does not have the authority to alter the Board's ruling that DMH must furnish the information sought in request number 9, nor to extend beyond seven days the time that DMH should be granted.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Department of Mental Health's ("DMH'), Motion for Reconsideration, is denied.

(2) DMH shall provide the Psychologists Union, Local 3758 of the D.C. Department of Mental Health, 1199 National Union of Hospital and Health Care Employees ("NUHHCE"), American Federation of State, County and Municipal Employees, AFL-CIO, with copies of the documents requested in request number 9 of NUHHCE's June 16, 2005 letter which DMH previously asserted were available on DMH's intranet, the District of Columbia government website and in notebooks at the various CSA sites. These document shall be provided to NUHHCE no later than seven (7) days from the service of this Decision and Order.

(3) DMH's request for a thirty day extension in order to provide those documents which they previously acknowledged were available, is denied. However, if the sources that DMH claimed they had do not contain the information sought by the Union, either party may seek a ruling from the Hearing Examiner as to how to satisfy that request. Should either party seek a ruling from the Hearing Examiner and should the Hearing Examiner determine that DMH must take further action in order to comply with the scope of information sought in request number 9, the Hearing Examiner does not have the authority to alter the Board's ruling that DMH must furnish the information sought in request number 9, nor to extend beyond seven days the time that DMH should be granted.

(4) Within ten (10) days from the issuance of this Decision and Order, DMH shall notify the Public Employees Relations Board ("Board"), in writing, of the steps it has taken to comply with paragraphs 2 and 3 of this Order.

(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.

November 18, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached corrected Decision and Order in PERB Case No. 05-U-41 was Hand Delivered to the following parties on this the 18th day of November 2005.

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