Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
	)	
American Federation of Government Employees, Local 631,	)	PERB Case No. 08-U-04
	)	
Complainant,	)	Opinion No. 924
	)	
v.	)	
	)	
District of Columbia Water and Sewer Authority,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

I. Statement of the Case:

On October 26, 2007, the American Federation of Government Employees, Local 631, ("Complainant", "AFGE, Local 631" or "Union"), filed an unfair labor practice complaint and a motion for preliminary relief against the District of Columbia Water and Sewer Authority ("Respondent" or "WASA"). AFGE, Local 631 asserts that WASA has violated the Comprehensive Merit Personnel Act ("CMPA"), as codified under D.C. Code § 1-617.04(a)(1), (2), (3) and (5) by failing to provide requested information which is relevant and necessary for the Union to properly represent bargaining unit member James Butler at arbitration.

AFGE, Local 631 asserts that WASA has refused to provide any of the requested information "in an effort to handicap the [U]nion's ability to arbitrate the grievance." (Motion at p. 1). Also, AFGE, Local 631 claims that the violations are clear cut and flagrant. In light of the above, AFGE, Local 631 requests that the Board: (1) grant its request for preliminary relief; (2) order WASA to cease and desist from violating the CMPA; (3) order WASA to post a notice and (4) order WASA to pay attorney fees and reasonable costs.

WASA filed a document styled "Opposition to Complainant's Motion for Preliminary Relief." In their submission WASA denies that it has violated the CMPA and contends that AFGE, Local 631 has failed to satisfy the requirements for preliminary relief.

AFGE, Local 631's motion and WASA's opposition are before the Board for disposition.

II. Discussion

James Butler is a member of AFGE, Local 631. "On July 13, 2007, Mr. Butler received a letter from WASA's Human Resources Department instructing him to undergo a fitness of duty [exam]." (Compl. at p. 3). On July 30, 2007, the Union filed a grievance on behalf of Mr. Butler. "The grievance alleged that [WASA] was using the fitness of duty procedure to harass Mr. Butler and that the medical examination was not warranted." (Compl. at p. 3). On September 13, 2007, the Union invoked arbitration pursuant to the parties' collective bargaining agreement ("CBA"). (See Compl. at p. 3). "On October 19, 2007 the [U]nion and [WASA] mutually agreed to [have Arbitrator Steven Wolf] hear the grievance regarding WASA's action taken against Mr. Butler." (Motion at p. 1).

"On or about October 4, 2007, Barbara Milton, President of AFGE, Local 631 submitted to Mr. [Stephen] Cook, Labor Relations Manager, [a request for] information. . . related to the presentation of a grievance filed on behalf of James Butler." (Compl. at p. 3).

The Union requested that WASA provide the following information:

> (1) [a] copy of all documents and information relied upon by [WASA] to request that Mr. Butler undergo a fitness for duty as requested in the July 13, 2007 letter; (2) [t]he names and job title of all individuals who alleged that they observed a suspected physical impairment of Mr. Butler. . . . includ[ing] the date, time and location the observation was made by each individual who suspected impairment; [and] (3) [t]he name of the management individual(s) who made observation(s) of Mr. Butler allegedly being completely winded when going from the basement gallery to the ground level (in the stairway) as indicated in [WASA's] July 13, 2007 letter. [Also,]. . . provide the date, time and location of the observation indicated in [the] July 13, 2007 letter. In addition, please provide any written document(s) submitted by these observers." (Union's Exhibit #2).

The Union states that its function as exclusive bargaining representative includes representing bargaining unit members in the negotiated grievance process. (See Compl. at p. 2). AFGE, Local 631 contends that the information requested by the Union is necessary and relevant

to the Union's representation of James Butler in the grievance process challenging the "fitness of duty examination". (See Compl. at p. 2).

The Union contends that "[d]uring the period of October 12, 2007 to the present, Barbara Milton made numerous verbal requests to Debra Leahy, Labor Relations Specialist, to provide the information sought by the union. Ms. Leahy informed Ms. Milton on those occasions that she does not have the information and is waiting for managers to give it to her. When asked when she would provide the information to the union, Ms. Leahy was vague and non-responsive. . . [AFGE, Local 631 asserts that by its actions WASA] is attempting to foil the union's investigation into the matter of WASA requiring James Butler to undergo a fitness for duty examination. [AFGE, Local 631 also claims that WASA] is. . . attempting to prevent the union from being able to present its case at arbitration. [AFGE, Local 631 contends that] [t]he Respondent's refusal to provide the information is egregious and arbitrary." (Compl. at pgs. 3-4).

AFGE, Local 631 asserts that the "information sought by the union is information that [WASA] is required to have in order to request a bargaining unit employee to undergo a fitness of duty medical examination. [WASA] is the keeper of these records and has refused to give the union information called for in its information request. . ." (Compl. at p. 4).

Furthermore, AFGE, Local 631 contends that WASA's ongoing violations of the CMPA "are clear-cut and flagrant." (Motion at p. 2). Also, the Union claims that if the Board "does not order preliminary relief Mr. Butler will suffer immediate and irreparable harm and the Board's ultimate remedy will be clearly inadequate." (Motion at p. 2). Therefore, AFGE, Local 631 asserts that preliminary relief is appropriate in this case.

WASA does not dispute the factual allegations regarding their failure to produce the information and documents which were requested by AFGE, Local 631. Nonetheless, WASA claims that: (1) it has not violated the CMPA and (2) AFGE, Local 631 has failed to satisfy the requirements for preliminary relief. In support of its position, WASA asserts the following:

> On October 4, 2007, the Complainant sent the Respondent a request for information with regard to a grievance it filed on behalf of employee James Butler. On October 19, 2007, the Parties mutually chose an arbitrator to hear the case. To date, the Respondent has not received confirmation from either the Federal Medication and Conciliation Service "FMCS" or the Arbitrator that the mutually agreed upon individual had agreed to serve as the neutral in this case. On October 26, 2006 Labor Relations Specialist Deborah Leahy told Ms. Milton, via a telephone conversation, that she was waiting to get the requested information from the department in question and that she would provide the information to Ms. Milton as soon as she [Ms. Leahy] received it

> herself. At no time, did [WASA] ever deny to provide the information to the Union.
>
> [The] Union's request for preliminary relief should be denied because it fails to meet the criteria required for the granting of preliminary relief pursuant to PERB Rule 520.15.
>
> * * *
>
> A party seeking preliminary relief must show probable cause of a violation of the CMPA, and that preliminary relief will serve the purposes of the act. [WASA] has not refused to provide this information to the Complainant and will do so once it is received from the department in question. Therefore, there is no probable cause that the Respondent has committed a violation of the CMPA.
>
> Furthermore, preliminary relief is inappropriate: where disputes exist over material facts or questions of contract interpretation . . . There is obviously a dispute over whether [WASA] denied the Complainant's request for information. Clearly this is a material fact. Therefore, preliminary relief is inappropriate in this case.
>
> Finally, the Complainant has failed to show probable cause of a violation of the CMPA in this matter. . .
>
> The Respondent respectfully requests that the Board deny the Complainant's request for preliminary relief in this matter for the reasons set forth above. The Respondent has not denied the Complainant's request for information and will provide the information at the earliest possible opportunity. Finally, as there has been no arbitration date set in this case, the Respondent has not been harmed by this delay in [WASA's] response in any way. (WASA's Opposition at pgs. 1-3).

WASA requests that the Board: (1) find that the Union's claim concerning WASA's failure to provide information and documents does not constitute an unfair labor practice: and (2) deny the Union's request for preliminary relief. (See WASA's Opposition at p. 2).

After reviewing the parties' pleadings, it is clear that WASA has not: (1) articulated any viable defense with respect to the information requested by the Union and (2) to date, provided the documents and information requested by the Union on October 4, 2007. As a result, we believe that the material issues of fact and supporting documentary evidence concerning AFGE, Local 631's October 4th request are undisputed by the parties. Thus, the allegation concerning WASA's failure to produce documents and information, does not turn on disputed material

issues of fact, but rather on a question of law. Therefore, pursuant to Board Rule 520.10[1], WASA's failure to produce documents and information can appropriately be decided on the pleadings.

This 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 DCR 2463, Slip Op. No. 272 at p. 4, PERB Case No. 90–U-10 (1991), we determined that "the employer's duty under the CMPA includes furnishing information that is 'both relevant and necessary to the Union's handling of [a] grievance' ..." Also, see Teamsters, Locals 639 and 730 v. D.C. Public Schools, 37 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health, Slip Op. No. 809, PERB Case No. 05-U-41 (2005). 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 Industrial Co., 385 U.S. 32, 36 (1967). "We have held that it is not the Board's role to determine the merits of a grievance as a basis for determining the relevancy or necessity of information requested by a union in the processing of a grievance." Doctors' Council of the District of Columbia v. Government of the District of Columbia, et al., 43 DCR 5391, Slip Op. No. 353 at p. 5, PERB Case No. 92-U-27 (1996); University of the District of Columbia v. University of the District of Columbia Faculty Association *supra*, Slip Op. No. 272 at n. 6.

In the present case, we find that the requested information and documents requested are 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. Also, WASA's Human Resources Department contacted Mr. Butler on July 13th; therefore, it is reasonable to conclude that as of the July 13th date, WASA had information concerning the reason(s) for the "fitness for duty exam". As a result, we believe that as of the July 13th date, WASA had in its possession most if not all of the information requested by the Union. Furthermore, it has been four months since WASA directed Mr. Butler to submit to the exam and one and one-half month since the Union requested information from WASA. We believe that WASA has had more than a reasonable period of time to comply with the Union's request for information. For the reasons discussed above, we find that WASA has failed

---

[1] Board Rule 520.10 provides as follows:

> [i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral arguments.

to show any countervailing concerns which outweigh its duty to disclose the requested information.

The Board, having reviewed this matter, concludes that by failing and refusing to produce information and documents for which WASA did not raise any viable defense, WASA failed to meet their statutory duty of good faith bargaining, thereby violating D.C. Code § 1-617.04(a)(5). See, Psychologists Union, Local 3758 of the D.C. Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health, Slip Op. No. 809 at p. 7, PERB Case No. 05-U-41 (2005). In addition, we have 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." 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).[2] In the present case, we find that WASA's failure to bargain in good faith with AFGE, Local 631 constitutes derivatively, interference with bargaining unit employees rights in violation of D.C. Code § 1-617.04(a)(1) (2001 ed.).

Since we have determined that WASA has violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case. AFGE, Local 631 is asking that the Board order WASA to: (1) provide the documents requested by the Union; (2) post a notice; (3) award attorney fees and reasonable costs; and (4) cease and desist from violating the CMPA. (See Compl. at p. 5).

Clearly WASA must produce the information and documents requested by the Union on October 4, 2007.

AFGE, Local 631 has requested that the Board order WASA to post a notice acknowledging that it has violated the CMPA. 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 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

---

[2] 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 Hospital, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1996); University of the District of Columbia v. University of the District of Columbia Faculty Association, *supra.*

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 violation found and the relief afforded . . . ." Charles Bagenstose v. D.C. Public Schools, 41 DCR 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). We are requiring that WASA post a notice to all employees concerning the violations found and the relief afforded. Therefore, bargaining unit employees who are most aware of WASA'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. For the reasons noted above, we grant the Union's request that WASA be ordered to post a notice.

AFGE, Local 631 requests that the Board award attorney fees. The Union was not represented by an attorney in this case. Therefore, the Union's request for attorney fees is denied.

AFGE, Local 631 has also 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, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 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.
>
> 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 reasonabl[y] 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 pgs. 4-5.

In the present case, it is clear that the Union made a request for information on October 4, 2007. As previously discussed, we believe that as of the July 13, 2007, WASA had in its possession most if not all of the information requested by the Union. However, WASA has not: (1) provided the information requested by the Union; or (2) articulated a viable defense or countervailing concern which outweighs its duty to disclose the requested information. We find that under the circumstances of this case: (1) WASA's position was wholly without merit and (2) a reasonably foreseeable result of WASA's conduct was the undermining of the Union among the employees for whom it is the exclusive representative.

In view of the above, we believe that the interest-of-justice criteria articulated in the AFSCME case would be served by granting AFGE, Local 631's request for reasonable costs in the present case. Therefore, we grant AFGE, Local 631's request for reasonable costs.

In light of our disposition of this case, AFGE, Local 631's request for preliminary relief is moot.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Water and Sewer Authority ("WASA"), its agents and representatives shall cease and desist from refusing to furnish the American Federation of Government Employees, Local 631 ("AFGE, Local 631" or "Union") with copies of the documents and information requested by the Union in its October 4, 2007 letter. The information and documents requested by AFGE, Local 631 on October 4, 2007, shall be provided to Union no later than fourteen (14) days from the service of this Decision and Order.

(2) WASA, 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 to bargain collectively through representatives of their own choosing.

(3) WASA 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.

(4) Within fourteen (14) days from the issuance of this Decision and Order, WASA 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, WASA shall provide the Board with proof that it has complied with paragraph 1 of this Order.

(5) AFGE, Local 631 shall submit to the Board, within fourteen (14) days from the issuance of this Decision and Order, a statement of actual costs incurred processing this complaint. The statement of costs shall be filed together with supporting documentation. WASA may file a response to the statement within fourteen (14) days from service of the statement upon it.

(6) WASA shall pay AFGE, Local 631's reasonable costs incurred in this proceeding within ten (10) days of the determination by the Board or its designee as to the amount of those reasonable costs.

(7) 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 21, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-04 was transmitted via Fax and U.S. Mail to the following parties on this the 21st day of November 2007.

Stephen Cook
Labor Relations Manager
D.C. Water and Sewer Authority
5000 Overlook, Avenue, S.W.
3rd Floor
Washington, D.C. 20032

FAX & U.S. MAIL

Barbara Milton, President
AFGE, Local 631
620 54th Street, N.E.
Washington, D.C. 20019

FAX & U.S. MAIL

Deborah Leahy, Esq.
Labor Relations Specialist
D.C. Water and Sewer Authority
5000 Overlook, Avenue, S.W.
3rd Floor
Washington, D.C. 20032

FAX & U.S. MAIL

Sheryl V. Harrington

Sheryl Harrington
Secretary

PERB
Public Employee Relations Board
Government of the District of Columbia
717 14th Street, N.W.
Suite 1150
Washington, D.C. 20005
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, 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. 924, PERB CASE NO. 08-U-04 (November 21, 2007)

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. 924.

WE WILL cease and desist from refusing to bargain in good faith with the American Federation of Government Employees, Local 631 ("Union"), by failing to provide information to the Union.

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 Water and
Sewer Authority

Date:_____ By:_____
General Manager

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 may questions concerning this Notice or compliance with any of its provisions, they may contact the Public Employee Relations Board at 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

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

November 21, 2007