Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/Department of Corrections Labor Committee,	
Complainant,	PERB Case No. 01-U-28 Opinion No. 671 Motion for Preliminary Relief
v.	
District of Columbia Department of Corrections and Anthony Williams, Mayor,	
Respondents.	

DECISION AND ORDER

On August 3, 2001, the Fraternal Order of Police/Department of Corrections Labor Committee ("Complainant" or "FOP") filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief.[1] The Complaint alleges that the District of Columbia Department of Corrections ("DOC") violated the Comprehensive Merit Personnel Act (CMPA) in connection with a reduction-in-force. Specifically, the Complaint alleges that DOC violated D.C. Code §1-618.4(a)(1),(3) and (5) by: (a) refusing to bargain over the impact and effect of a Mayor's Administrative Order dated May 10, 2001, authorizing a reduction-in-force; (b) interfering with, restraining and coercing bargaining unit employees in the exercise of rights guaranteed under D.C. Code §1-618.6; (c) discriminating in regard to the terms and conditions of employment of bargaining unit members in

[1]FOP has filed three unfair labor practice complaints against the District of Columbia Department of Corrections (PERB Case Nos. 01-U-21, 01-U-28 and 01-U-32), concerning the same or different reductions-in-force. As a result, the parties agreed to consolidate the three cases. Hearing dates have been scheduled for these matters on November 13-15, 2001.

order to discourage membership in the FOP/DOC Labor Committee; and (d) refusing to bargain over the impact and effects of an August 3, 2001 reduction-in-force (RIF). (Compl. at par.1). The Complainant is asking the Board to grant its request for Preliminary Relief and order DOC to: (1) rescind the RIF notices that were sent to employees; (2) reinstate employees separated by the RIF; (3) make reinstated employees whole; and (4) engage in bargaining over the impact and effects of the RIF prior to the RIF's implementation.[2] DOC filed an answer to the Unfair Labor Practice Complaint denying all the substantive charges in the Complaint, including that it failed or refused to bargain with the Complainant. However, DOC did not file a response to the Request for Preliminary Relief.

The Motion for Preliminary Relief is before the Board for disposition. We believe that the Complainant's request for preliminary relief does not meet the threshold criteria that the Board has adopted for granting such relief. Specifically, the Complaint does not establish that there is reasonable cause to believe that the CMPA has been violated and that remedial purposes of the law will be served by pendente lite relief.

The Complainant alleges that on or about May 10, 2001, a Mayor's Administrative Order was issued authorizing a reduction-in-force which became effective on August 3, 2001. In addition, FOP claims that despite "numerous written and oral requests for impact and effect bargaining since May 25, 2001, [the] respondents have... unilaterally issued notices to employees for separation without bargaining with FOP/DOC Labor Committee." (Compl. at p.2). FOP concedes that at least one bargaining session took place. However, FOP alleges that at this meeting it made DOC aware of a large number of inaccuracies that were contained in DOC's retention register. Specifically, FOP argues that DOC's retention register contained the names of employees who had either retired, resigned or been terminated. As a result, FOP requested a list of all employees that were reassigned to vacant positions pursuant to the RIF. However, FOP claims that DOC failed to provide them with the requested information. Instead, DOC began implementation of the RIF. The Complainant contends that DOC's actions violated the CMPA. As a result, FOP filed their complaint and motion.

The criteria the Board employs for granting preliminary relief is prescribed under Board Rule 520.15. Board Rule 520.15 provides in pertinent part as follows:

> The Board may order preliminary relief where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy will be clearly inadequate.

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[2] The Board could not consider the requested relief prior to the August 3rd RIF because the request for preliminary relief was not filed until August 3rd .

The Board has held that its authority under Board Rule 520.15 is discretionary. AFSCME, D.C. Council 20, et al. v. D.C. Government, et. al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under this rule, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where [PERB] has determined that the standard for exercising its discretion has been met, the bases for such relief were restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." Clarence Mack, et al. v. FOP/DOC Labor Committee, et at., 45 DCR 4762, Slip Op. No. 516 at p.3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its answer to the Complaint, DOC disputes the material elements of all the allegations asserted in the Complaint. For example, DOC denies that the parties have not engaged in impact and effects bargaining prior to the issuance of the RIF notices. The Board has found that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 6067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998). Whether DOC's actions occurred as FOP claims, or whether such actions constitute violations of the CMPA, are matters best determined after the establishment of a factual record through on unfair labor practice hearing.

Also, the Board has held that management's rights under D.C. Code §1-618.8(a) do not relieve an agency of its obligation to bargain with the exclusive representative of its employees over the impact or effect of, and procedures concerning, the implementation of these management right decisions. IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). The effect and impact of non-bargainable management decisions on terms and conditions of employment are, however, bargainable only upon request. Teamsters local 639 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). Furthermore, the Board has held that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code §1-618.4(a) (1) and (5) by unilaterally implementing a management right decision under D.C. Code §1-618.8(a), without notice or bargaining.[3] University of the District of Columbia Faculty Association v. University of the

[3]By contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required in order to establish a failure to bargain in good faith. Under such circumstances, management's right to bargain attaches to the matter implemented or changed, and management's unilateral action precludes any opportunity to make a request to bargain prior to implementation or change. AFGE, Local 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287, PERB

District of Columbia, 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). In light of the above, the issues concerning whether FOP requested bargaining and whether bargaining occurred, are questions of fact to be determined after the establishment of a factual record.

FOP's claims that DOC's actions meet the criteria of Board Rule 520.15 are little more than repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of DOC's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOC's actions presumably affect all correctional officers who were affected by the August 3rd RIF, but 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 asserts a public interest in collective bargaining for District employees, the alleged violations, even if determined to be valid, do not rise to the level of seriousness that would undermine public confidence in DOC's administration of its labor relations responsibilities. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution processes, the FOP has presented no evidence that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted. Moreover, this case has been consolidated with two other matters and has been scheduled for a November 13, 2001 hearing. In addition, the Board's Executive Director has requested that the Hearing Examiner issue his report and recommendation fifteen days earlier than required by Board Rules. Therefore, this matter has been expedited.

Under the facts of this case, the alleged violations and their impact do not satisfy any of the criteria prescribed by Board Rule 520.15. Therefore, the circumstances presented do not appear appropriate for the granting of preliminary relief.

In conclusion, the Complainant has failed to provide evidence which demonstrates that the allegations, even if true, are such that the remedial purposes of the law would be served by pendente lite relief. Should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Complainant following a full hearing.

For the reasons discussed above, the Board: (1) denies the Complainant's Motion for Preliminary Relief; and (2) directs the development of a factual record through an unfair labor practice hearing.

Case No. 90-U-11 (1992).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's Motion for Preliminary Relief is denied.

2. This case is consolidated with PERB Case Nos. 01-U-21 and 01-U-32. The consolidated cases are scheduled for a hearing beginning on November 13, 2001.

3. The Hearing Examiner shall prepare a report and recommendation within fifteen days after the close of the hearing and the receipt of briefs, if any.

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

November 13, 2001

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 01-U-28 was transmitted via Fax and/or U.S. Mail to the following parties on this 13th day November 2001.

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