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**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
American Federation of Government Employees, AFL-CIO, Local 2978,	)	
	)	
Complainant,	)	PERB Case No. 08-U-47
	)	
v.	)	Opinion No. 987
	)	
Government of the District of Columbia, Department of Health,	)	<b>Motion to Dismiss</b>
	)	<b>Motion for Preliminary Relief</b>
Respondent.	)	
	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

The American Federation of Government Employees, AFL-CIO, Local 2978 ("Complainant" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") and Motion for Preliminary Injunctive Relief and Temporary Restraining Order ("Motion") against the District of Columbia Department of Health ("Respondent" or "DOH").<sup>1</sup> The Complainant is alleging that the Respondent has violated D.C. Code § 1-617.04(a)(1), (3) and (5) of the Comprehensive Merit Personnel Act ("CMPA") by converting Union President Robert Mayfield from career status to term status and subsequently terminating his employment. (See Complaint at p. 2).

The Complainant requests that the Board: (1) grant its Motion for Preliminary and Injunctive Relief and Motion for a Temporary Restraining Order; (2) order reinstatement of Union President Robert Mayfield to his career position of Public Affairs Specialist; (3) order DOH to make Mayfield whole, including interest, for all losses caused by DOH's unfair labor practices; (4) order DOH to pay attorneys' fees and costs; (5) order DOH to

<sup>1</sup> The Complaint and the Motion for Preliminary Relief were filed as one pleading but will be identified separately in this Decision and Order.

post an appropriate notice to employees; and (6) order DOH to take such affirmative action as effectuates the policies and purposes of the CMPA. (See Complaint at p. 3).

DOH filed an Opposition and an Answer to the Complaint denying any violation of the CMPA. DOH also filed a Motion to Dismiss the Union's Complaint. The Union has requested that DOH's Motion to Dismiss be denied in a pleading styled "Union's Reply to Motion to Dismiss." The Complainant's Motion and DOH's Motion to Dismiss are before the Board for disposition.

## II. Discussion

The following facts are not in dispute. Robert Mayfield was employed in the Community Health Administration of the DOH as a Public Affairs Specialist in April 2005. (See Complaint at p. 1; Motion to Dismiss at p. 2). In May of 2007, DOH was aware that Mayfield was active in the Union as a Shop Steward representing employees in the grievance procedure, and later serving as Vice-President, and then President of the Union. (See Complaint at p. 1; Motion to Dismiss at p. 2). On October 14, 2007, the DOH converted Mayfield's appointment from a term appointment to a career appointment as a Public Affairs Specialist, CS1035-11. (See Complaint at p. 2; Motion to Dismiss at p. 2). At Mayfield's request, a desk audit was conducted on April 3, 2007. (See Complaint at p. 2; Motion to Dismiss at p. 2). In accordance with the desk audit, by letter dated April 25, 2008, DOH informed Mayfield that his position was upgraded from a grade 11 to a grade 12. (See Complaint at p. 2; Motion to Dismiss at p. 3). In the same letter, DOH stated that Mayfield's conversion to career status was erroneous and that his position had been returned to a term status. (See Complaint at p. 2; Motion to Dismiss at p. 3). By letter dated May 30, 2008, DOH stated that Mayfield's term appointment had a "not to exceed" date of June 6, 2008. (See Complaint at p. 2; Motion to Dismiss at p. 3). He was placed on administrative leave effective May 30, 2008 through June 6, 2008, and was terminated effective the close of business on June 6, 2008. (See Complaint at p. 2; Motion to Dismiss at p. 3)

The Complainant asserts that DOH's actions converting Mayfield from career status to term status and subsequently terminating his employment were motivated by animosity towards Mayfield for his Union activity. (See Complaint at p. 2). The Union alleges that Mayfield's termination caused irreparable harm by among other things: (a) interfering with employee's access to representation by their elected President in violation of D.C. Code § 1-617.04(a)(1); (b) discriminating against Mayfield because of his union activities and to "discourage" union activity and membership in a labor organization in violation of D.C. Code § 1-617.04(a)(3); and (c) "refusing to bargain in good faith with the union in violation of D.C. Code § 1-617.04(a)(5)." (Complaint at pgs. 2-3). The Complaint does not present any specific argument addressing the request for preliminary relief. (See Complaint at p. 3). Nonetheless, the Union is requesting that the Board grant its Motion and enjoin DOH from terminating Mr. Mayfield on June 6, 2008. (See Complaint at p. 3).

Respondent does not deny that Mayfield's status was changed from term to career, but asserts that "while processing Mayfield's promotion/upgrade, his appointment as a Public Affairs Specialist was mistakenly converted from a term appointment to a career appointment." (Answer at p. 2). DOH denies that the conversion of Mayfield was motivated by animosity toward Mayfield for his union activity, nor a desire to discourage such activities in other union members. (See Answer at p. 3). Furthermore, DOH denies that the decision not to renew Mayfield's term appointment caused irreparable harm. (See Answer at p. 3). As a result, DOH asserts that the Complainant's Motion for Preliminary Injunctive Relief and Restraining Order should be denied. Also, DOH requests that the Complaint be dismissed because "Complainant has failed to state a claim for which relief can be granted by the Board." (Motion to Dismiss at p. 2).

#### Motion for Preliminary Relief

The Union requests preliminary relief pursuant to Board Rule 520.15<sup>2</sup> and requests that the Board render a decision before Mr. Mayfield's termination date of June 6, 2008. The Union's Motion was filed on June 6, 2008, the same day Mr. Mayfield's termination was to take effect. DOH's Opposition was due June 16, 2008<sup>3</sup>, and in addition, in accordance with Board Rules 520.6<sup>4</sup> and 501.5<sup>5</sup>, the Answer was due June

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<sup>2</sup> Board Rule 520.15 provides as follows:

The Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted 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 may be clearly inadequate.

<sup>3</sup> Pursuant to Board Rule 553.2, the Opposition was due within five (5) days of service of the Complainant's Motion. Board Rule 501.4 provides that: - "[w]henver 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.

<sup>4</sup> Board Rule 520.6 provides, in relevant part, as follows:

A respondent shall file, within fifteen (15) days from service of the complaint, an answer containing a statement of its position with respect to the allegations set forth in the complaint.

<sup>5</sup> Board Rule 501.5 provides, in relevant part, as follows:

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.

23, 2008. In view of this filing schedule, the Board would have been unable to rule upon the Complainant's Motion prior to President Mayfield's termination.<sup>6</sup>

For this reason, we find that Complainant's request for preliminary relief is moot.<sup>7</sup>

#### Motion to Dismiss

In its Motion to Dismiss, DOH argues that the Union has failed to establish a nexus between President Mayfield's union activity and DOH's decision not to renew his term appointment. (See Motion to Dismiss at p. 2). Also, DOH asserts that "[e]ven assuming, *aguardo*, that Complainant's factual allegations are true, none of the allegations constitutes an unfair labor practice." (Motion to Dismiss at p. 3). In support of this assertion, DOH contends that the Complainant failed to allege facts that constitute a violation of D.C. Code §§ 1-617.04(a)(1), (3) and (5). (See Motion to Dismiss at pgs. 5-7).

When considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may result in a violation of the CMPA. See *Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 DCR 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). Also, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. See *JoAnne G. Hicks v. District of Columbia Office of the Deputy Mayor for Finance, Office of the Controller and American Federation of State, County and Municipal Employees, District Council 24*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992).

The Board has determined that "[to maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, Respondent's actions [can not] be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence, does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 43 DCR 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. See, *Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 DCR 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560,

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<sup>6</sup> The Board notes that it was unable to hold a meeting on June 6, 2008, because the Board did not have the three members necessary to "constitute a quorum for the transaction of business." (D.C. Code § 1-605.01(1)).

<sup>7</sup> Should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Union following a full hearing.

Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine.” *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

In the present case, the Complainant alleges that DOH was aware that Mr. Mayfield was the Union’s President and that DOH’s actions converting Mayfield from career status to term status and subsequently terminating his employment was motivated by animosity towards Mayfield for his Union activity. (See Complaint at p. 2). DOH contends that its original decision to change Mayfield to career status was a mistake and that its actions were a management right. (See Reply to the Motion to Dismiss at p. 3). It is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so based on these pleadings alone. In cases such as this, the Board has found that a motion to dismiss is not appropriate. See *Ellowese Barganier v. Fraternal Order of Police/Department of Corrections Labor Committee and District of Columbia Department of Corrections*, 45 DCR 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998). Although the facts in this matter are in dispute, we find that the Complainant has pled or asserted factual allegations that, if proven, would constitute a statutory violation. As a result, we deny DOH’s Motion to Dismiss.

For the reasons discussed above, we: (1) find that the Complainant’s request for preliminary relief and a temporary restraining order is moot; (2) deny DOH’s Motion to Dismiss; and (3) direct the development of a factual record through an unfair labor practice hearing.

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Department of Health’s Motion to Dismiss is denied.
2. The American Federation of Government Employees, AFL-CIO, Local 2978’s Motion for Preliminary Relief and a Temporary Restraining Order is moot.
3. The Board’s Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner utilizing an expedited hearing schedule. Thus, the Hearing Examiner will issue the report and recommendation within twenty-one (21) days after the closing arguments or the submission of briefs. Exceptions are due within ten (10) days after service of the report and recommendation and oppositions to the exceptions are due within five (5) days after service of the exceptions.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
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.

September 30, 2009

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 08-U-47 was transmitted via Fax and U.S. Mail to the following parties on this the 30<sup>th</sup> day of September 2009..

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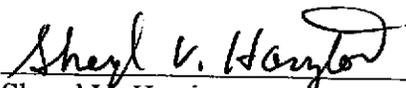
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