

conduct that constitutes an unfair labor practice under § 1-617.04(a) of the D.C. Official Code (2001 ed.), and, therefore, the Respondent moves that the Complaint be dismissed in its entirety"; and (2) "[t]he Respondent reserves the right to add new or additional Affirmative Defenses as they become known." (Answer at p. 6). The Union's Complaint and Motion, and OCME's Answer are before the Board for disposition.

II. Discussion

AFGE alleges the following facts in support of its Complaint:

4. By memorandum dated November 14, 2008, bargaining unit member Muhammad Abdul-Saboor was issued an Admonition as discipline.
5. On March 19, 2009, representatives of the Union and Mr. Abdul-Saboor met with representatives of OCME including Chief of Staff Beverly Fields for the purpose of the Union filing and discussing a grievance concerning, among other issues, OCME directing Mr. Abdul-Saboor to work outside of his position description.
6. At the outset of the meeting, the Union explained its intent to file a grievance, but also expressed its interest in resolving the grievance informally at the lowest possible level by engaging the OCME in a discussion about the Union's allegations.
7. The Union provided Fields with a copy of its written grievance at the meeting.
8. Fields responded that she did not want to discuss the Union's grievance regarding Mr. Abdul-Saboor, and that if the Union persisted in its grievance, OCME "will just have to RIF him" in regards to Mr. Abdul-Saboor.
9. On April 23, 2009, the Union filed an amendment to its grievance.
10. By letter dated May 21, 2009, OCME denied the Union's grievance.
11. By letter dated August 28, 2009, OCME notified Mr. Abdul-Saboor that he was being separated from service effective September 30, 2009, in a reduction in force.

12. OCME failed to give the Union any notice that it was conducting a reduction in force that would impact bargaining unit members.
13. Upon information and belief, OCME has a number of vacancies for which Mr. Abdul-Saboor would qualify, but has not placed him in any vacancies or made any other effort to maintain his employment with OCME or the District government as required by law.
14. The Union has demanded implementation and effects bargaining over OCME's RIF of Mr. Abdul-Saboor.
15. By the conduct alleged above, OCME has violated D.C. Code § 1-617.04 (a) (1), (3), and (5).
16. At this time, the Union is aware of no related or other proceedings involving the allegations in this complaint other than the grievance about which OCME has retaliated against Mr. Abdul-Saboor for filing.

(Complaint at pgs. 2-3).

Based upon the alleged facts in the Complaint, AFGE asks that the Board "find that OCME's conduct constitutes an unfair labor practice and" direct OCME to:

- A. Cease and desist from violations of D.C. Code § 1-617.04 (a) (1), (3) and (5) in the manner alleged or in any like or related manner;
- B. Provide the Union with advance notice of all reductions-in-force affecting bargaining unit members;
- C. Reinststate Mr. Abdul-Saboor to his position and make him whole;
- D. Consent to arbitration of the merits of the Union's grievance;
- E. Pay the Union's costs in this matter;
- F. Post an appropriate notice to employees; and
- G. Desist from or take such affirmative action as effectuates the policies and purposes of the [CMPA].

(Complaint at p. 3).

AFGE also submitted a request for preliminary relief, asking the Board:

to order preliminary relief requiring the [OCME] to immediately put on hold its reduction-in-force of Muhammad Abdul-Saboor. OCME's RIF of Abdul-Saboor on September 30, 2009, is in retaliation for pursuing a grievance and as such is plainly unlawful and warrants emergency relief. Accordingly, the Union requests immediate preliminary relief . . .

(Motion at p. 1).

In addition to the facts alleged in the Complaint, AFGE asserts the following facts in support of its Motion:

[T]he position held by Muhammad Abdul-Saboor was the last remaining position in AFGE Local 2978's unit at OCME. (Mayfield Dec. at f. 3.)

Abdul-Saboor held the position of Fleet Management Specialist, CS-2101-07, at OCME. (Mayfield Dec. at 1(5.) Abdul-Saboor is the only Fleet Management Specialist at OCME, and according to his position description is responsible for providing "technical expertise in the transportation, fleet management, and logistic operations pertaining to body pick-up and delivery of deceased individuals throughout the District of Columbia; and, to develop and implement fleet management/logistics policy, procedures and guidance necessary for effective and efficient movement of multiple bodies in the event of disaster where multiple fatalities occur." (Mayfield Dec. at 1(6.) Abdul-Saboor began as Fleet Management Specialist with OCME in 1999, and after leaving to work at a different agency, returned to OCME at the request of the Agency and under the expectation that his position would be upgraded from a Grade 7 to a Grade 9. (Mayfield Dec. at 17.)

By memorandum dated August 13, 2009, the Department of Human Resources sought approval on OCME's behalf for a reduction-in-force of Abdul-Saboor's position. OCME did not provide this memorandum to the Union until September 25, 2009.

Abdul-Saboor's position is one of only four positions being RIF-ed by OCME, the other positions all being in the Fatality Review Department.

(Motion at pgs. 2-3)(citations to exhibits omitted).

On September 25, 2009, the parties bargained over the implementation and effects of OCME's RIF of Abdul-Saboor. (See Motion at p. 3). During the course of the bargaining:

Fields represented that the reasons for the reduction in force in the August 13, 2009, memorandum from Human Resources were the basis for OCME's action, but could not describe what position or positions would assume the duties of Abdul-Saboor's position. Fields also referenced the Union's grievance and Abdul-Saboor not wanting to perform particular duties in describing how other employees could perform the duties of Abdul-Saboor's position. In response to an inquiry from the Union about other positions at OCME for Abdul-Saboor, the Office of Labor Relations and Collective Bargaining's representative explained that OCME needed to separate Abdul-Saboor and could not afford to keep him in another position. OCME provided some information that the Union had requested at the September 25th meeting, but the remainder of the information is still outstanding and OCME refused to make any commitment as to when it would be produced.

(Motion at pgs. 3-4).

Based upon the foregoing alleged facts, AFGE argues that OCME has committed "a Clear-Cut and Flagrant" violation of the CMPA. (Motion at p. 5). The Union contends that:

[i]t is an unfair labor practice for an agency to retaliate by RIF-ing an employee for engaging with his union in union activity. See *AFGE Local 2725 v. DC Housing Authority*, Slip Op. 514 (1997). If a discriminate is engaged in protected activity that the agency knows about, there is a presumption an unfair labor practice has occurred. *AFGE Local 1403 v. Office of the Attorney General*, Slip Op. 935 (2008).

(Motion at p. 5).

In addition, AFGE claims that the Board's "ultimate remedy may be ineffective" because the Union believes that the Board:

has found that [where] the selection of an employee to be RIF-ed was motivated by a discriminatory reason, an appropriate remedy is to undo the discriminatory conduct within the RIF. See *FOP v.*

Department of Corrections, [52 DCR 2496,] Slip Op. [No.] 722[, PERB Case Nos. 01-U-21, 01-U-28, 01-U-32] (2003). Here, that would mean reinstating Abdul-Saboor to his position as Fleet Management Specialist. If PERB ultimately grants this relief and restores Abdul-Saboor to his former position, the passage of time will likely render the Board's remedy ineffective. Out of necessity, Abdul-Saboor is actively looking for another position. In the meantime, OCME has annihilated the Union's bargaining unit at the Agency. Particularly in light of the strength of the Union's discrimination/retaliation claim, the PERB's reinstatement of Abdul-Saboor after the time it will take to litigate the Union's complaint will be meaningless because the Union and Abdul-Saboor will likely be unable to enjoy the benefits of the remedy. For this reason, too, the PERB should grant preliminary relief in this case.

(Motion at p. 6).

The Union concludes that:

[b]ecause the undisputed facts demonstrate that OCME's violation of the CMPA is clear-cut and flagrant and that the PERB's ultimate remedy may be rendered inadequate, PERB should order preliminary relief

[and] order OCME to suspend its reduction-in-force of Abdul-Saboor and reinstated him to his position pending a final decision by the Board, and to order OCME to fulfill its bargaining obligations to the Union.

(Motion at p. 6).

OCME denies the allegations that its conduct violated the CMPA. In its Answer to the Complaint, OCME admits that Mr. Abdul-Saboor was issued an admonishment, but denies that it was a form of discipline. (See Answer at p. 2). OCME also disputes several of AFGE's allegations concerning the grievance submitted on behalf of Mr. Abdul-Saboor. Specifically, OCME denies that the RIF resulting in the termination of Mr. Abdul-Saboor was in retaliation for the submission of the grievance. (See Answer at pgs. 2-5).

In addition, OCME made two affirmative defenses. First, OCME contends that:

The Complainant fails to allege any conduct that constitutes an unfair labor practice under § 1-617.04(a) of the D.C. Official Code (2001 ed.), and, therefore, the Respondent moves that the Complaint be dismissed in its entirety.

[And t]he Respondent reserves the right to add new or additional Affirmative Defenses as they become known. To the extent that Respondent has failed to respond to other allegations within the Complaint, Respondent denies those remaining allegations. (Answer at p. 6).

Motion for Preliminary Relief

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part:

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.

In addition, the Board has held that its authority to grant preliminary relief is discretionary. *See 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 Board Rule 520.15, this 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 [the Board] has determined that the standard for exercising its discretion has been met, the [basis] for such relief [has been restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997). Moreover, the Board has held that preliminary relief is not appropriate where material facts are in dispute. *See DCNA v. D.C. Public Health and Hospitals Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

A review of the parties' pleadings reveals that the parties disagree on the facts in this case. Specifically, the parties are in disagreement over whether the grievance filed by the Union on behalf of Mr. Abdul-Saboor prompted his termination. Therefore, establishing the existence of the alleged unfair labor practice violations would turn on evaluating the evidence and making credibility determinations on the basis of these conflicting allegations. We decline to do so based upon these pleadings alone. In such cases as this, the Board has found that preliminary relief is not appropriate. *See DCNA v. D.C. Health and Hospital Public Benefit Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, AFGE 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. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Respondents following a full hearing. In view of the above, we deny the Complainant's Motion for Preliminary Relief.

Motion to Dismiss

OCME requests that the Board dismiss AFGE's Complaint on the basis that there is no evidence of the commission of an unfair labor practice and because the Board lacks jurisdiction based upon the facts alleged in FOP's Complaint. (See Answer at p. 4).

The Board has held that while a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged violations of the CMPA. 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 see *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 DCR 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); See also *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). Furthermore, 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 20*, 40 DCR 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). Without the existence of such evidence, Respondent's actions cannot 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).

D.C. Code §1-617.04(a)(1) (2001 ed.), provides that "[t]he District, its agents and representatives are prohibited from: . . . [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter[.]"¹ D.C. Code § 1-617.04(a)(3) provides that "[d]iscriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as

¹ "Employee rights under this subchapter are prescribed under D.C. Code [§1-617.06(a) and (b) (2001ed.)] and consist of the following: (1) [t]o organize a labor organization free from interference, restraint or coercion; (2) [t]o form, join or assist any labor organization; (3) [t]o bargain collectively through a representative of their own choosing . . . ; [and] (4) [t]o present a grievance at any time to his or her employer without the intervention of a labor organization[.]" *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 45 DCR 5078, Slip Op. No. 553 at p. 2, PERB Case No. 98-U-03 (1998).

otherwise provided in this chapter; (5) provides that “[r]efusing to bargain collectively in good faith with the exclusive representative” is a violation of the CMPA.²

AFGE contends that OCME has retaliated against Mr. Abdul-Saboor for filing a grievance over the admonishment he received. In the present case, it is clear a dispute exists over whether OCME instituted a RIF resulting in Mr. Abdul-Saboor’s termination as retaliation for filing a grievance. The [Board] has held that the filing of grievances under the collective bargaining agreement constitutes protected activity.” *Citing inter alia, Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 43 DCR 5585, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000); *Wright Line*, 251 NLRB 1083 (1980, enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)). In addition, as noted in *American Gardens Management Co.*, 338 NLRB 644, 645 (2002), temporal proximity between protected conduct and action which a complainant views as adverse may be sufficient to infer retaliatory motive. Moreover, the Board has acknowledged that “[d]etermining motivation is difficult. Therefore a careful analysis must be conducted to ascertain if the stated reason for the RIF is pretextual. The employment decision must be analyzed according to the ‘totality of the circumstances’. Relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment.” *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000), *citing NLRB v. Nueva*, 761 F.2d 961, 965 (4th Cir. 1985).” In order to make such a determination, it is necessary to fully develop the record in this matter. Whereas the Board finds that the Union has pled allegations that, if proven, would constitute a violation of D.C. Code § 1-617.04(a)(1), (3) and (5), OCME’s motion to dismiss is denied. As a result, the Complaint, and its allegations against the Respondents, will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, AFL-CIO, Local 2978’s Motion for Preliminary Relief is denied.
2. The District of Columbia Office of the Chief Medical Examiner’s motion to dismiss is denied.

²The Board notes that pursuant to the CMPA, management has an obligation to bargain collectively in good faith and employees have the right “[t]o engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative[.]” *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921 v. District of Columbia Public Schools*, 42 DCR 5685, Slip Op. 339 at p. 3, PERB Case No. 92-U-08 (1992). Also, D.C. Code § 1-617.04(a)(5) (2001) provides that “[t]he District, its agents and representatives are prohibited from...[r]efusing to bargain collectively in good faith with the exclusive representative.” Further, D.C. Code §1-617.04(a)(5) (2001ed.) protects and enforces, respectively, these employee rights and employer obligations by making their violation an unfair labor practice.

2. The Board's Executive Director shall refer the The American Federation of Government Employees, AFL-CIO, Local 2978's 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.

August 12, 2011

CERTIFICATE OF SERVICE

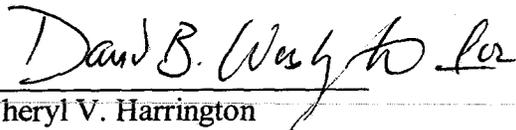
This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 09-U-62 are being transmitted via Fax and U.S. Mail to the following parties on this the 12th day of August, 2011.

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