Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
Council of School Officers, Local 4, American Federation School Administrators, AFL-CIO,	)	
Complainant,	)	PERB Case No. 04-U-38
v.	)	Opinion No. 803
District of Columbia Public Schools,	)	
Respondent.	)	

DECISION AND ORDER

I. Statement of the Case:

This case involves an unfair labor practice complaint filed by the Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO ("Complainant," "Union" or "CSO"), alleging that the District of Columbia Public Schools ("DCPS" or "Respondent") violated D.C. Code § 1-617.04(a)(1), (3) and (5) (2001 ed.).[1] Specifically, CSO asserts that DCPS committed

[1]D.C. Code § 1-617.04(a)(1), (3) and (5) provide as follows:

> (a) The District, its agents, and representatives are prohibited from:
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> (1) Interfering, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
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> * *
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> (3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

an unfair labor practice by: (1) retaliating against bargaining unit member Joseph Dixon ("Mr. Dixon" or "Dixon") for exercising his grievance rights under the parties' collective bargaining agreement and (2) refusing to respond to a grievance filed by CSO on behalf of Mr. Dixon, thereby violating the good-faith bargaining requirements of the Comprehensive Merit Personnel Act of 1978 ("CMPA"). (See Compl. at p. 3). As a remedy, the Complainant requests that the Board order DCPS to: (1) rescind the letter of reprimand issued to Mr. Dixon; (2) reinstate Mr. Dixon to his previous position as Director of the Brown Special Education Center; (3) post a notice; and (4) pay the Complainant's costs. (See Compl. at pgs. 3-4).

DCPS did not file a timely answer to the complaint and the matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation (R&R) in which he found that DCPS violated the CMPA. DCPS filed exceptions to the Hearing Examiner's R&R and the CSO filed an opposition to DCPS' exceptions. The Hearing Examiner's R&R, DCPS' exceptions and CSO's opposition are before the Board for disposition.

II. Background:

CSO alleges that on or about July 16, 2004, Assistant Superintendent Dale A. Talbert sent a letter of reprimand to Mr. Dixon, Director of the Brown Special Education Center. (See Compl. at p. 2). In response to the reprimand, Mr. Dixon requested an informal meeting with Assistant Superintendent Dale Talbert by letter dated July 20, 2004. However, CSO claims that Mr. Dixon did not receive a reply. (See Compl. at p.2). On July 21, 2004, CSO filed a Step 2 grievance on behalf of Mr. Dixon pursuant to the negotiated grievance procedures contained in the parties' collective bargaining agreement. CSO requested that the Step 2 grievance "meeting be scheduled prior to the Superintendent's Summer Conference [scheduled] for August [2004]." (Compl. at p. 3).

CSO asserts that "[r]ather than respond to the grievance contesting the written reprimand issued to Mr. Dixon, DCPS hand-delivered a letter on August 11, 2004 notifying Mr. Dixon that the Superintendent of Schools had determined not to reappoint him [to his position]." (Compl. at p. 3). CSO claims that the August 11th letter contained some factual and typographical errors. As a result, approximately one week later, DCPS reissued the letter having corrected certain factual and typographical errors. (See Compl. at p. 3).

CSO contends that the decision by the Superintendent not to reappoint Mr. Dixon was done in retaliation for Mr. Dixon's attempt to exercise his rights under the parties' collective bargaining

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> organization, except as otherwise provided in this chapter;
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> * * *
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> (5) Refusing to bargain collectively in good faith with the exclusive representative.

agreement by filing a grievance. Specifically, CSO claims that: (a) the decision not to reappoint Mr. Dixon was unlawful and violates D.C. Code § 1-617.04(a)(1) and (3); and (b) DCPS' failure to respond to the grievance violates the good-faith bargaining requirements of D.C. Code §1-617.04(a)(5). (See Compl. at p. 3).

By letter dated August 31, 2004, the Board's Executive Director informed DCPS' General Counsel that an unfair labor practice complaint was filed by CSO against DCPS. The August 31st letter also noted that pursuant to Board Rule 520.6, DCPS could file an answer to the complaint by close of business on September 15, 2004. (See R & R at p. 2; also, see Letter from Executive Director Castillo to DCPS' General Counsel Veleter M.B. Mazyck, dated August 31, 2004).

DCPS did not file a timely answer to the complaint. Instead, two weeks after the deadline, by letter dated September 30, 2004, DCPS requested that the Board's Executive Director grant DCPS a fifteen (15) day extension in order to file their answer.

Citing Board Rules 501.2 and 501.3,[2] the Board's Executive Director denied DCPS' request. Specifically, by letter dated October 4, 2004, the Executive Director noted the following:

> In the present case, the District of Columbia Public Schools' answer was due in this office no later than the close of business (**4:45 p.m.**) on **September 15, 2004.** However, [DCPS'] request for an extension

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[2]Board Rule 501.2 and 501.3 provide as follows:

> **501.2 - Request for Extension of Time**
> A request for an extension of time shall be in writing and made at least three (3) days prior to the expiration of the filing period. Exceptions to this requirement may be granted for good cause shown as determined by the Executive Director.
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> **501.3 - Waiver of Time Limits**
> The request for an extension of time shall indicate the purpose and reason for the requested extension of time and the positions of all interested parties regarding the extension. With the exception of the time limit for the filing of the initial pleading that begins a proceeding of the Board, the parties may waive all time limits established by the Board by written agreement in order to expedite a pending matter.

> of time was received on September 30, 2004. As a result, [DCPS'] request does not comply with the requirement of Board Rule 501.2. Notwithstanding the untimeliness of your request, Board Rule 501.3 allows the parties to waive the time limits established by the Board. However, this waiver must be in writing. Consistent with Board Rule 501.3, an extension may be granted in the present case only if the parties agree to the extension. (See Letter from Executive Director Castillo to Stephanie Ramjohn Moore, Attorney for DCPS, dated October 4, 2004).

In his October 4th letter, the Board's Executive Director also noted that a review of DCPS' submission revealed that DCPS did not serve CSO with a copy of their request for an extension of time. As a result, the Executive Director informed DCPS that consistent with Board Rule 501.12 all future pleadings filed by DCPS should also be served on CSO's representative.

Subsequently, DCPS filed a document styled "*Motion for Leave to File Answer to Unfair* Labor Practice Complaint". In that filing, DCPS asserted that the unfair labor practice complaint was without merit because DCPS never issued the letter of reprimand. Furthermore, DCPS argued that CSO would not be prejudiced if DCPS was granted additional time to file an answer, "'since a hearing ha[d] not yet been scheduled' and Mr. Dixon '[was] not likely to prevail on his Complaint'." (Motion for Leave to File Answer to Unfair Labor Practice Complaint at p. 2). Along with its Motion, DCPS submitted a proposed Answer, accompanied by a Declaration of Assistant Superintendent Dale Talbert.

CSO opposed the Motion, *inter alia*, on the ground that "DCPS fail[ed] to provide any reason that would satisfy the good cause requirement set forth in Board Rule 501.2." (CSO's Opposition to Motion for Leave to File Answer to Unfair Labor Practice Complaint at p. 2). Also, CSO requested that: (1) the allegations set forth in the Complaint be deemed admitted based on DCPS' failure to file an answer; (2) a determination be made that DCPS waived its right to a hearing; and (3) an award of fees be granted. (See CSO's Opposition to DCPS' Motion at p. 3).

CSO's Complaint and the various motions were assigned to a Hearing Examiner, and a hearing was scheduled for December 10, 2004.

At the December 10th hearing "the Hearing Examiner invited the parties to address DCPS' Motion, and the matter was discussed at length. [Subsequently,] [t]he Hearing Examiner denied the Motion orally on the record [based on a lack] of good cause shown." (R & R at p. 3).[3] "After

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[3]The Hearing Examiner noted that DCPS did not serve CSO with a copy of the September 30th request for an extension. Also, the Hearing Examiner indicated that the request for an extension of time was neither offered into nor made a part of the record. (See R & R at p. 2).

soliciting the parties' input as to the status of the matter given the lack of an Answer, the Hearing Examiner gave the parties leave to brief the question [of] whether the facts as alleged in the Complaint, if accepted as admitted, constitute an unfair labor practice, and, if so, what the appropriate remedy would be." (R & R at p. 4).

On January 6, 2005, DCPS filed both a Motion for Reconsideration of DCPS' Request for Continuance and Motion for Leave to File Answer and a separate Motion to Hold Case in Abeyance Pending the Disposition of the Related Grievance. CSO opposed both motions. Both motions were referred to the Hearing Examiner for resolution.

III. The Hearing Examiner's Report and Recommendation, DCPS' Exceptions and CSO's Opposition to DCPS' Exceptions.

Based on the pleadings, the record developed at the hearing and the parties' post-hearing briefs, the Hearing Examiner identified two issues for resolution. These issues, his findings and recommendations, DCPS' exceptions and CSO's opposition to the exceptions, are as follows:

A. Pending Motions

Before focusing on the merits of the case, the Hearing Examiner considered: (1) DCPS' Motion for Reconsideration; (2) DCPS' Motion for Leave to File an Answer; and (3) DCPS' Motion to Hold Case in Abeyance Pending the Disposition of the Related Grievance. His ruling on these motions are discussed below.

1. Motion for Reconsideration of DCPS' Request for Continuance and Motion for Leave to File Answer

The Hearing Examiner indicated that in its Motion, DCPS "takes exception" both to the Hearing Examiner's oral denial of its Motion for Leave to File Answer and to the Executive Director's denial of its request for an extension of time to file an Answer. (See R & R at p. 4). Furthermore, the Hearing Examiner observed that in its Motion, DCPS restates its case for leave to file an Answer arguing that it would suffer "substantial, unfair harm due solely to a single administrative error." (DCPS' Motion at p. 3).

CSO objected to DCPS' Motion on the grounds that DCPS' submission is an improper attempt to seek an interlocutory review of the Hearing Examiner's denial of the earlier Motion for Leave to File Answer, and that, even if considered, it should be denied as untimely. (See CSO's Motion to Strike and Opposition to Motion by Respondent to Hold Case in Abeyance at pgs. 4-5).

The Hearing Examiner noted that "[i]nsofar as DCPS expressly refers to its Motion as an 'exception,' it is unclear whether DCPS intends with its motion to seek review of the Hearing

Examiner's oral denial of its earlier Motion for Leave to File Answer, or is simply asking the Hearing Examiner to reconsider his earlier decision." (R & R at p. 4).

Relying on Board Rule 520.13[4] the Hearing Examiner noted that "[b]y the time of the filing of this 'exception,' the Hearing Examiner had yet to issue any report and recommendation. Neither has DCPS demonstrated that it obtained Board authorization to file an interlocutory appeal. Accordingly, the exception is not authorized." (R & R at p. 5).

Next the Hearing Examiner focused on whether DCPS' motion was a motion for reconsideration. The Hearing Examiner determined that if DCPS' motion was intended to serve as a motion for reconsideration, he was denying the motion. In support of his determination, the Hearing Examiner noted the following:

> To the extent the "exception" merely is intended to be a request for reconsideration, the [CSO]'s opposition to the Motion is well-stated and persuasive. By rule, exceptions to a Hearing Examiner's Report and Recommendation must be filed within fifteen days of service of the Report and Recommendation. Here, the Hearing Examiner's oral denial at hearing of the Motion for Leave to File Answer, although not contained in any Report and Recommendation at the time, was, at least by analogy, "served" on DCPS on December 10, 2004. Even assuming that it is proper to ask a Hearing Examiner to reconsider a ruling on a motion, and that a Hearing Examiner has the authority to consider such a request, it would make little sense to provide more time for such a request than for the filing of exceptions under Rule 520.13. On that basis alone, the Hearing Examiner denies the Motion for Reconsideration.
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> In any event, DCPS raises nothing new in its Motion for Reconsideration. The Hearing Examiner denied the initial motion upon review of the filings and after providing DCPS ample opportunity to demonstrate good cause for its failure to file a timely Answer. Indeed, the Hearing Examiner expressly stated at hearing that, "I am deeply concerned that the requests that I do have before me for extension of time are devoid of any indication of good cause." Tr. 11. The Hearing Examiner therefore asked counsel for DCPS,

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[4]Board Rule 520.13 provides that "[p]arties may file exceptions and briefs in support of the exceptions not later than fifteen (15) days after service of the hearing examiner's report and recommendations."

> "[A]re you aware of any authority out there on which I can ignore a rule that I regard to be clear and unequivocal?" Tr. 13.
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> Counsel's reply: "Not off the top of my head, Hearing Officer, but if you would allow me to brief you on such case law, I could possibly present that to you after the hearing." Id. The Motion for Reconsideration, it must be noted, contains not a single citation to any authority to suggest that the "good cause" standard can be met by the bare assertion, offered without any supporting evidence, that in effect, the Agency's General Counsel "misrouted" *sic,* a properly served Complaint.
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> The Agency did not demonstrate "good cause" to the Executive Director, did not demonstrate "good cause" at hearing, and nothing in the Motion for Reconsideration cures that deficiency. Accordingly, for all of the foregoing reasons, the Hearing Examiner denies the Motion for Reconsideration. (R & R at pgs 5-6).

DCPS filed an exception to the Hearing Examiner's finding. CSO filed an opposition to DCPS' exception. DCPS' exception is based on its contention that "[t]he Hearing Examiner committed egregious error in not allowing DCPS to file its Answer to the [C]omplaint. . . ." (DCPS' Exceptions at p. 1). In support of its argument DCPS asserts the following:

> DCPS had a meritorious defense in response to the complaint and if permitted to proceed would have shown Plaintiff's allegations were not supported by the evidence. . . . The Hearing Examiner points to the Attorney Advisor's inability to point to "any authority out there on which I can ignore a rule that I regard to be clear and unequivocal". . . . however the Hearing Examiner by virtue of the [Board] rules has discretionary authority to rule upon motions, as cited in 550.13(c). So to that end, the Hearing Examiner could have ruled to grant DCPS an extension in the filing of the Answer. In addition, as Hearing Examiner with the authority to conduct hearings it can be inferred the Hearing Examiner has the authority to allow evidence to be admitted which is untimely filed, and further under 550.20, "[a] Hearing Examiner *may* refuse to consider any motion or other action which is not timely filed in compliance with this section." The language contained in this rule is *may*, which is discretionary and the Hearing Examiner had the authority solely by his position to allow the untimely Answer filed by DCPS. . . . Denying DCPS the right to file an Answer severely prejudices the case, does not materially affect the rights of the

> Union[5] and will not afford DCPS the opportunity to be fully heard. In addition, the [Board] will not have a complete and accurate record of the facts before rendering its decision. (DCPS' Exceptions at pgs. 1, 2 and 5, emphasis in original).

We find that DCPS' argument to this Board concerning the Hearing Examiner's denial of its motion raises no new argument and is merely a repetition of the argument considered and rejected by the Hearing Examiner. Thus, we believe that the basis of DCPS's exception is its disagreement with the Hearing Examiner's decision not to allow DCPS leave to file an answer. "This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record." Teamsters, Local Unions 639 and 670 v. District of Columbia Public Schools, 54 DCR 2609, Slip Op. No. 804 at p. 6, PERB Case No. 02-U-26 (2005). See also, AFGE, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We believe that the Hearing Examiner fully considered all relevant issues of fact and law in his Report and Recommendation in reaching his decision to deny DCPS' motion for leave to file an answer. We find his ruling fully supported by the record. Moreover, we "have previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." AFGE, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). "Furthermore, we have held that a Hearing Examiner's findings based on competing evidence does not give rise to a proper exception where as here, the record contains evidence supporting the Hearing Examiner's finding." Cassie Lee v. AFGE, Local 872, 54 DCR 2593, Slip Op. No. 802 at p. 8, PERB Case No. 04-S-07 (2006). In light of the above, we adopt the Hearing Examiner's finding that DCPS' Motion for Leave to File an Answer, should be denied.

2. Motion to Hold case in Abeyance Pending the Disposition of the Related Grievance

DCPS argued that CSO invoked arbitration on behalf of Mr. Dixon claiming that "DCPS not only wrongfully issued Mr. Dixon a letter of reprimand, but also terminated him in retaliation for grieving the letter of reprimand." (R & R at p. 6). DCPS asserted that the retaliation allegation in the grievance "is based on the identical facts underlying the instant unfair labor practice charge, and both the grievance and the unfair labor practice charge claim that Dixon's non-reappointment, or as DCPS also refers to it, 'his termination,' is in retaliation for his action in grieving the earlier letter of reprimand." (R & R at p. 6). The parties "are in the process of scheduling [the] arbitration hearing. . . ." (R & R at p. 6). In light of the above, DCPS asks that the instant charge be held in abeyance pending resolution of the grievance procedure.

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[5]DCPS argues that the "Union would not have suffered harm if DCPS were granted leave to file its Answer 22 calendar days (or 16 business days) late." (DCPS' Exceptions at p. 2).

CSO opposed the motion "on the grounds that the motion is untimely, in effect waived, and in any event will not avoid the duplication of effort underlying the deferral policy insofar as a hearing already has been conducted in this matter and post-hearing briefs already have been filed." [6] (R & R at pgs. 6-7). CSO argued that deferral would serve no proper purpose at this time. In addition, CSO asserted that "DCPS has, to date, refused to join issue with the [CSO] over the grievance, having entirely ignored it. As [CSO] sees it, DCPS should not, as a policy matter, be permitted now to focus on the grievance." ® & R at p. 7). Finally, CSO claimed that "the grievance is not identical to the instant unfair labor practice charge, as the grievance challenges a letter of reprimand under the collective bargaining agreement, whereas the instant case alleges that Dixon was terminated in reprisal for filing that grievance in violation of the CMPA." (R & R at p.7).

As a preliminary matter, the Hearing Examiner notes that the parties differ over the facts relating to the grievance itself. The CSO refers to a July 21, 2004 Step 2 grievance which is attached to its Complaint in this matter. That grievance challenges the July 16, 2004 letter of reprimand under the collective bargaining agreement. DCPS, by contrast, references a different Step 2 grievance dated August 11, 2004, which not only challenges what presumably is the same July 16, 2004 letter of reprimand, but also alleges that Mr. Dixon was terminated in reprisal for grieving that letter of reprimand. DCPS also references a Step 3 grievance, filed five days later on August 16, 2004, also challenging both the letter of reprimand and the termination, and purportedly invoking arbitration over those two issues.

The Hearing Examiner denied DCPS' "Motion to Hold case in Abeyance Pending the Disposition of the Related Grievance." In support of his ruling, the Hearing Examiner noted the following:

> Regardless of which grievance or grievances now are pending between the parties, by failing to file an answer to the Complaint DCPS is deemed to have admitted that it terminated Mr. Dixon rather than to respond to his grievance. Additionally, the [CSO] argues that DCPS has ignored its grievance - whichever one may actually be pending at this time - and DCPS presents no evidence to the contrary. DCPS has provided the Hearing Examiner with a copy of the letter invoking arbitration and a Demand for Arbitration purportedly submitted by the [CSO] to the American Arbitration Association, but there is no evidence that DCPS has taken any action on the grievance

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[6] The Hearing Examiner noted that "[a]lthough DCPS' Motion is dated January 6, 2005, it timely filed its post-hearing brief only four days later, on January 10, 2005. [CSO] also timely filed its post-hearing brief on January 10, 2005, and timely filed its consolidated opposition to DCPS' Motions for Reconsideration and Deferral the next day, January 11." (R & R at p. 7, n. 4).

> other than to have received the various papers that it now alleges were filed by the [CSO] at various times with various agencies. DCPS asserts only that the parties "are in the process of scheduling an arbitration in this matter,". . . a claim that is unsupported by any evidence and that is inconsistent with the [CSO's] assertions. The Hearing Examiner, in short, is persuaded that the request for deferral is driven not by an interest in resolving the underlying grievance through the negotiated procedure - a procedure that, as discussed below, DCPS bypassed in favor of a retaliatory termination - but by an interest in avoiding the hardship of [Board] Rule 520.7 in light of the now thrice-repeated rulings denying, for lack of good cause, DCPS' attempts to file a belated Answer to the instant charge.
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> DCPS' delay in requesting deferral to this late date provides additional reason not to grant the motion; it appears to be a post hoc strategy designed solely to avoid earlier adverse rulings of both the Executive Director and this Hearing Examiner related to DCPS' failure to file an Answer to the underlying Complaint . . . DCPS had ample opportunity to raise the deferral issue earlier in this proceeding; having failed to do so, there is no basis in Board policy to defer the matter at this time, given the posture of this case. (R & R at pgs. 8-9).

In addition, concerning the argument that this case should be deferred until the arbitration in this matter is completed, the Hearing Examiner determined as follows:

> Moreover, the unfair labor practice charge raises an issue distinct from any contractual issue that might be pending. Specifically, the question whether DCPS violated the CMPA by terminating Mr. Dixon in reprisal for his action in filing a grievance does not require the interpretation of any contractual provision; it requires a straightforward factual inquiry followed by application of Board law. The Board's deferral policy is explained in AFGE v. DCDPW, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04, Slip Op. 266 (1991). There, the Board suggests that deferral is appropriate where interpretation of contractual provisions is necessary to the determination whether a statutory violation has occurred. Id. at 4, n.3. The Board also explains that the question of deferral "is one of policy. As such it turns upon the posture as well as the issues of each case." Id.
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> Resolution of the instant charge of unfair labor practice does not

> require any interpretation of the parties' collective bargaining agreement, and the lateness of DCPS' request for deferral provides an additional basis for rejecting it. (R & R at pgs. 8-9).

Neither DCPS nor CSO filed exceptions to the Hearing Examiner's finding on this issue. After reviewing the pleadings and the record, we conclude that the Hearing Examiner's finding that the Board's deferral policy does not apply to the facts of this case is reasonable, supported by the record and consistent with Board precedent. In view of the above, we adopt the Hearing Examiner's finding that DCPS' Motion to Hold Case in Abeyance Pending the Disposition of the Related Grievance, should be denied.

B. Unfair Labor Practice Charges

1. Allegation concerning retaliation

Citing Teamsters, Local 730 v. D.C. Public Schools, 43 DCR 5585, Slip Op. No. 375, PERB Case No. 93-U-11 (1994), CSO argued that "together with the allegations that DCPS is deemed to have admitted, the [Union] . . . established that the filing of [Mr.] Dixon's grievance is protected activity, and that DCPS violated the CMPA when it terminated Dixon in retaliation for filing that grievance." (R & R at p. 9).

DCPS countered that CSO "failed to establish a *prima facie* case of retaliation, and argues, alternatively, that it had legitimate, non-discriminatory reasons for its decision not to reappoint Mr. Dixon."[7] (R & R at p. 9). Regarding the existence of a *prima facie* case, DCPS argue[d] that the letter of reprimand is a clear indication that DCPS had 'serious concerns about Mr. Dixon's performance and his insubordinate behavior prior to him ever filing a grievance'." (R & R at p. 9).

As a preliminary issue, the Hearing Examiner noted that CSO alleged that "DCPS' termination of Mr. Dixon in reprisal for his filing a grievance under the parties' collective bargaining agreement constitutes a violation of CMPA § 1-617.04(a) (1) and (3)." (R & R at p. 10). Relying on Teamsters, Local 370 v. DCPS, the Hearing Examiner observed that "[a]bsent a demonstrated intention to encourage or discourage membership in a labor organization, . . . there can be no finding of a violation of § 1-617.04(a)(3). Where the allegation, instead, is that the retaliation is based solely on the filing of a grievance, without any intention to encourage or discourage Union membership, the charge must be brought under § 1-617.04(a)(4)." (R & R at p. 10, citing Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools, 38 DCR 4154, Slip Op. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991)). The Hearing Examiner concluded that "[a]s in Teamsters, Local 370, DCPS

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[7]The Hearing Examiner indicates that DCPS cites numerous factual allegations not contained in this record, to support its claim that DCPS would have terminated Mr. Dixon regardless of the filing of the grievance. (See R & R at p. 9).

is not denied any fundamental due process rights by virtue of correcting the improper pleading and considering the allegations of unfair labor practice in light of (a)(4) rather than (a)(3)." (R & R at p. 10).

Next the Hearing Examiner focused on the merits of the case. He noted the following:

> Absent the filing of an Answer to the Complaint, [Board] Rule 520.7 and [Board] decisions thereunder require the Hearing Examiner to deem as admitted all allegations in the Complaint. It bears emphasis that Rule 520.7 expressly provides: "A respondent who fails to file a timely answer shall be deemed to have admitted to the material facts alleged in the complaint and to have waived a hearing. The failure to answer an allegation shall be deemed as an admission of the allegation." Notwithstanding this rule and the Board's history of enforcing its plain meaning, it still must be determined whether the material facts and allegations of the Complaint establish the commission of an unfair labor practice. *Unions in Comp. Unit 20 et. al v. DCDOH*, PERB Case No. 02-U-13, Slip. Op. 688 at 3(2002).
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> As already noted, the underlying Complaint specifically alleges the filing of a grievance under the parties' collective bargaining agreement. Complaint ¶ 7. The filing of such a grievance is protected activity, and reprisal against an employee for engaging in such protected activity is a violation of § 1-617.04 (a)(1) and (4). *Teamsters Local 730, supra,* Slip Op. 375 at 3 ("The Hearing Examiner correctly notes that we have previously held that [filing a grievance] is an employee right and is protected under the CMPA from retaliation by a District government agency." (Citation omitted.)) The Complaint specifically alleges that DCPS determined not to reappoint Dixon to his position in "retaliation for Mr. Dixon's attempt to exercise his rights under the collective bargaining agreement." Complaint ¶ 9. The allegations of the Complaint, deemed admitted by operation of Rule 520.7, sufficiently tie DCPS' action in terminating Dixon's employment to the asserted statutory violation, *i.e.*, §§ 1-617.04(a)(1) and, as corrected, (4). *See Unions in Comp. Unit 20, supra*, Slip Op. 688 at 3. Accordingly, the Hearing Examiner concludes that DCPS, as alleged, committee an unfair labor practice in violation of CMPA §§ 1-617.04(a)(1) and (4) when it terminated Dixon's employment in retaliation for his action in filing a grievance under the parties' collective bargaining agreement.

DCPS filed an exception to the Hearing Examiner's finding that DCPS retaliated against Mr. Dixon for filing a grievance. DCPS asserts that: (1) the Union failed to establish a *prima facie* case of retaliation, and (2) it had legitimate, non-discriminatory reasons for its decision not to reappoint Mr. Dixon. (See Exceptions at pgs. 8-11). Regarding the existence of a *prima facie* case, DCPS argues that:

> [T]he Union cannot establish any nexus between the Superintendent's reappointment decision and Mr. Dixon's grievance filing. Although the decision to reappoint Mr. Dixon was issued after the Union filed a grievance on his behalf, it was also in close proximity to Mr. Dixon's flagrant rule violations, his insubordination and his disruptive behavior. Under well established labor law principles, where the same action would have been taken absent any protected activity, a complaining party cannot establish a *prima facie* case of retaliation because there is no nexus between the protected activity and the challenged action. (Exceptions at pgs 8-9).

In addition, DCPS claims that it had serious concerns about Mr. Dixon's performance and his insubordinate behavior prior to him ever filing a grievance. (See Exceptions at pgs. 9-11).

We find that DCPS' argument concerning the charge of retaliation raises no new argument and is a repetition of the argument considered and rejected by the Hearing Examiner when he considered DCPS' Motion for Leave to File an Answer. Thus, we believe that the basis of DCPS' exception is its disagreement with the Hearing Examiner's finding and conclusion of law that DCPS retaliated against Mr. Dixon in violation of the CMPA. Therefore, the Board must determine whether the Hearing Examiner erred in finding that DCPS retaliated against Mr. Dixon in violation of D.C. Code § 1-617.04(a) (1) and (4).

In accordance with Board Rule 520.6, DCPS' answer to the complaint was filed late. As a result, the Hearing Examiner ruled that pursuant to Board Rules CSO's allegations were deemed admitted. In addition, he concluded that CSO met their burden of proof with regard to the retaliation allegation.

We adopt the Hearing Examiner's determination that DCPS did not file a timely answer to the Complaint. "Board Rule 520.7 provides in relevant part [that]: [a] respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing." Unions in Compensation Unit 20 v. D.C. Department of Health, 49 DCR 11131, Slip Op. No. 688 at p. 3, PERB Case No. 02-U-13 (2000).

"Although the material facts alleged in the complaint are deemed admitted, the Board must still determine whether the Complainant has met [its] burden of proof concerning whether an unfair

labor practice has been committed." Unions in Compensation Unit 20 v. D.C. Department of Health, 49 DCR 11131, Slip Op. No. 688, at p. 3, PERB Case No. 02-U-13 (2000). Also 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). Furthermore, 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]." 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) and (4) (2001), provide that "[t]he District, its agents and representatives are prohibited from: (1) [i]nterfering, restraining or coercing any employees in the exercise of the rights guaranteed by this subchapter; . . . or (4) [d]ischarging or otherwise taking reprisals against an employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony . . ." "Section [1-617.04(a)(4) expressly and specifically protects employees who engage in any of the listed activities therein when it is pursuant to matters under the CMPA." Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270 at 11, PERB Case Nos. 88-U-33 and 88-U-34 (1991). In its complaint CSO asserted that DCPS did not reappoint Mr. Dixon to his position in retaliation for his filing a grievance. In support of its argument, CSO assert the following:

> On July 16, 2004 Mr. Dixon received a letter of reprimand. Subsequently, on July 20th Mr. Dixon requested an informal meeting with Assistant Superintendent Dave Talbert. Thereafter, on July 21st CSO filed a Step 2 grievance on behalf of Mr. Dixon. CSO contends that "rather than respond to the grievance contesting the written reprimand issued to Mr. Dixon, DCPS hand delivered a letter on August 11, 2004 notifying Mr. Dixon that the Superintendent of Schools had determined not to reappoint him." (Compl. at p. 3).

CSO suggests that the 22 days between the filing of the grievance and the decision not to reappoint Mr. Dixon demonstrates that there was a nexus between Mr. Dixon exercising his right to file a grievance and DCPS' decision not to reappoint Mr. Dixon. CSO asserts that by filing a grievance Mr. Dixon was engaged in protected activity under D.C. Code §1-617.04(a)(1). In view of the above, CSO claims that DCPS violated § 1-617.04(a)(1) and (4).

Pursuant to Board Rule 520.7, CSO's allegations are deemed admitted. We have held that filing a grievance is an employee right and is protected under the CMPA from retaliation by a District government agency. See, Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). After reviewing the pleadings in a light most favorable to the Complainant, the Board finds that the 22 days that elapsed between CSO filing a grievance on behalf of Mr. Dixon and DCPS' decision not to reappoint Mr.

Dixon to his position established a statutory cause of action. Specifically, we find that there is a nexus between Mr. Dixon filing his grievance and DCPS' decision not to reappoint.

We find that Mr. Dixon was engaged in protected activity and that DCPS' action in terminating Mr. Dixon constitutes a violation of the CMPA. While DCPS' action constitutes an unfair labor practice under the CMPA, the evidence establishes that DCPS did not violate D.C. Code § 1-617.04(a) (3) but rather D.C. Code § 1-617.04(a) (4). Consistent with our holding in Teamsters Local 370 v. DCPS, *supra* we adopt the Hearing Examiner's finding that "[a]s in *Teamsters, Local 370,* DCPS is not denied any fundamental due process rights by virtue of correcting the improper pleading and considering the allegations of unfair labor practice in light of (a)(4) rather than (a)(3)." *(R & R at p. 10).* "*Notwithstanding this correction, we adopt the Hearing Examiner's conclusion that* by these same actions, DCPS has interfered with, restrained and coerced employees in the exercise of their rights in violation of D.C. Code § 1-61[7].04(a) (4)." Teamsters Local 370 v. DCPS, *supra,* Slip Op. No. 375 at p. 4. See also, Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools, *supra.*

Also, we note that DCPS claims that they had an affirmative defense in this case. However, by failing to file a timely answer they waived the right to challenge the allegations. In light of the above, we believe that the basis of DCPS's exception is its disagreement with the Hearing Examiner's finding that the allegation regarding retaliation is deemed admitted and his conclusion of law that DCPS' action violates the CMPA. "This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record." Teamsters Local Unions 639 and 670 v. District of Columbia Public Schools, 54 DCR 2609, Slip Op. No. 804 at p. 6, PERB Case No. 02-U-26 (2005). See also, AFGE, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We believe that the Hearing Examiner fully considered all relevant issues of fact and law in his Report and Recommendation in reaching his conclusion that DCPS violated D.C. Code § 1-617.04(a)(1) and (4). We find his ruling fully supported by the record. Moreover, we "have previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." AFGE, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991).

2. Allegation concerning bad faith bargaining

The Hearing Examiner notes that CSO asserted "simply that, ' DCPS also committed an unfair labor practice when it refused to process the grievance filed by Mr. Dixon and the Union.'" (R & R at p. 11). DCPS countered that "this allegation amounts to no more than a breach of contract claim, and does not state a statutory violation." Id.

The Hearing Examiner determined that CSO failed to meet its burden of proof with regard to this allegation. In support of his conclusion, the Hearing Examiner states the following:

> Even if a refusal to process a grievance could rise to the level of a statutory violation, an issue on which the parties do not agree, the bare allegations of the Complaint do not, in the Hearing Examiner's judgment, establish a violation of the CMPA. [CSO] cites *FOP v. MPD*, PERB Case No. 89-U-07, Slip Op. No. 242 (1990). That case establishes that an employer violates the CMPA when it bypasses the Union in an effort to negotiate directly with bargaining unit members for waivers of the provisions of a collective bargaining agreement. The [CSO]'s allegations of refusal to process a grievance bear no resemblance to the facts at issue in *FOP v. MPD*. Moreover, the Hearing Examiner notes that the initial grievance was filed on July 21, 2004, and the charge of unfair labor practice was filed on August 30, 2004. That relatively short time period, without more, is not persuasive evidence that DCPS failed to bargain in good faith with the [CSO] in violation of 1-617.04(a)(5). (R & R at p. 11).

In light of the above, the Hearing Examiner recommends the dismissal of this allegation. The CSO did not file an exception to this finding. DCPS did not file a specific exception to this finding. However, DCPS argues that the Union failed to state a claim for unlawful refusal to bargain. (See Exceptions at pgs. 11-12).

After reviewing the pleadings and the record, we conclude that the Hearing Examiner's finding is reasonable, supported by the record and consistent with Board precedent. In view of the above, we adopt the Hearing Examiner's finding that CSO's allegation concerning DCPS' refusal to bargain should be dismissed.

IV. Remedy

Since we have adopted the Hearing Examiner's finding and conclusions that DCPS violated the CMPA, we now turn to the issue of what is the appropriate remedy in this case. CSO is asking that the Board order DCPS to: (1) reinstate Mr. Dixon; (2) post a notice; (3) award costs and fees; and (4) cease and desist from violating the CMPA. (See Compl. at pgs. 3-4).

Citing, DCNA v. Mayor and PBC, 45 DCR 6736, Slip Op. No. 558 at pgs. 3-4, PERB Case No. 95-U-03 (1998), CSO asks that a *status quo ante* remedy be imposed reinstating Mr. Dixon to his position as Director of the Brown Special Education Center or an equivalent position, and to make him whole for any loses he may have suffered due to the wrongful decision not to reappoint him. (See R & R at p. 12). "In response to the Hearing Examiner's inquiry at the hearing, the [CSO]

argue[d] that any lesser remedy would render 'nugatory' [Board Rule] 520.7, by which DCPS is deemed to have admitted the allegations contained in the Complaint." Id.

Relying on the DCNA case, at pgs. 3-4, the Hearing Examiner is recommending that the Board grant CSO's request for a *status quo ante* remedy placing Mr. Dixon in his former position that he held prior to his unlawful termination (or a substantially equivalent position) and make him whole for any loss resulting from his unlawful termination. "We have held that status quo ante remedy that returns affected employees to their positions, or to substantially equivalent positions, prior to an unlawful adverse action, e.g., for example [termination], and makes them whole for any resulting loss is appropriate relief." DCNA, supra. Consistent with out holding in the DCNA case, we adopt the Hearing Examiner's recommendation that CSO's *status quo ante* remedy be granted.

We also adopt the Hearing Examiner's finding that the two offending notices of non-reappointment referenced in the Complaint that underlie this proceeding, dated August 10 and 20, 2004, must be rescinded and expunged from DCPS records. The Hearing Examiner specifically declines to recommend the rescission of the July 16, 2004 Written Reprimand, as there is no allegation in the Complaint or in this case that the written reprimand itself is unlawful.

The Complainant requests that the Board award fees and costs. (See Complaint at p. 4) The Hearing Examiner is recommending that the Board deny CSO's request for attorney fees. "[This] Board has held that D.C. Code § 1-617.13, which expressly permits the Board to require the payment of reasonable costs incurred by a party, does not include attorney fees. Nor are we properly authorized to provide attorney fees elsewhere in the Code." Tracy Hatton and Fraternal Order of Police Department of Corrections Labor Committee, 47 DCR 769, Slip Op. No. 451 at p. 8, PERB Case No. 95-U-02 (1995). See also, International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital, 39 DCR 9633, Slip Op No. 322, PERB Case No. 91-U-14 (1992); and, University of the District of Columbia Faculty Association NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for fees, to the extent that it is a request for attorney fees, is denied.

The Complainant has also requested that reasonable costs be awarded. The Hearing Examiner is recommending that the Board award reasonable costs with respect to DCPS' Motion for Reconsideration and DCPS' Motion for Deferral. For the reasons discussed below we reject this recommendation.

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 that case, the Board

concluded that it could, under certain circumstances, award reasonable costs, stating:[8]

> 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, the Hearing Examiner found that CSO did not prove that DCPS violated D.C. Code§ 1-617.04(a)(3) or (5) and we adopted these findings. "We believe that the interest-of-justice criteria articulated in the AFSCME case, would not be served by granting the CSO's request for reasonable costs in the present case. Specifically, it cannot be said that DCPS' claim or position was wholly without merit or that the challenged action was undertaken in bad faith. As a result, the Board does not believe that the interest-of-justice test has been met in this case." Wendell Cunningham v. FOP/MPD, 50 DCR 2403, Slip Op. No. 693 at p. 2, PERB Case Nos. 01-U-04 and 01-S-01 (2002).

Concerning the posting of a notice, we adopt the Hearing Examiner's remedy requiring that DCPS to post a notice acknowledging that they have violated the CMPA. The Board has previously noted that, "the overriding purpose and policy of relief afforded under the CMPA, for [conduct which] violates employee rights, is the protection of rights that inure to all employees". Charles Bagenstose v. D.C. Public Schools, 41 DCR 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). 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. . . ." Id. Those employees who are most aware of DCPS' conduct and thereby affected by it, will know that exercising their rights under the CMPA is indeed

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[8]The Board has made it clear that attorney fees are not a cost.

fully protected. Also, a notice posting requirement serves as a strong warning against future violations. Furthermore, DCPS has not presented a compelling reason for removing the notice posting requirement recommended by the Hearing Examiner.

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. The Board hereby adopts the Hearing Examiner's findings and conclusion that DCPS: (a) violated D.C. Code §1-617.04(a)(1) and (4) by retaliating against Mr. Dixon for engaging in protected activity; and (b) did not refuse to bargain in good faith in violation of D.C. Code §1-617.04(a)(5). Accordingly, we adopt the Hearing Examiner's recommended remedies except the awarding of costs. For the reasons set forth above, we reject the Hearing Examiner's recommendation to award costs. The request for costs is hereby denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public Schools ("DCPS"), their agents and representatives shall cease and desist from terminating or otherwise taking reprisals against Joseph Dixon in violation of D.C. Code § 1-617.04(a)(1) and (4) (2001 ed.) for pursuing an action protected by the District of Columbia Comprehensive Merit Personnel Act ("CMPA").

2. DCPS shall not in any like or related manner interfere with Mr. Dixon's rights guaranteed him by the CMPA.

3. Within thirty (30) days of the issuance of this Decision and Order, DCPS shall reinstate Mr. Dixon to the position that he held prior to his unlawful termination, or to its substantial equivalent.

4. Within thirty (30) days of the issuance of this Decision and Order, Mr. Dixon shall be made whole for his losses resulting from his unlawful termination.

5. Within thirty (30) days of the issuance of this Decision and Order, the two notices of Mr. Dixon's non-reappointment shall be rescinded and expunged from DCPS records.

6. DCPS shall post conspicuously within ten (10) days from the service of this Opinion the attached Notice where notices to employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.

7. DCPS shall notify the Public Employee Relations Board ("Board"), in writing, within

fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DCPS shall notify the Board of the steps it has taken to comply with the directives in paragraphs 2, 3, 4 and 5 of this Order.

8. The Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO's request for costs and fees are denied for the reasons stated in this Slip Opinion.

9. 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.

June 29, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.04-U-38 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of June 2007.

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Secretary

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS, 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. 803, PERB CASE NO. 04-U-38 (JUNE 29, 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 rescind the termination of Joseph Dixon and otherwise make him whole in accordance with law for any benefits lost due to his termination.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (4) by the actions and conduct set forth in Slip Opinion No. 803.

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 Public Schools

Date:_____ By:_____

Acting Chancellor

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 communicate directly with the Public Employee Relations Board, whose address is: 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.

June 29, 2007