Government of the District of Columbia
Public Employee Relations Board

Washington Teachers' Union, Local 6 American Federation of Teachers, AFL-CIO Complainant, and, District Of Columbia Public Schools, Respondent.	**PERB Case No. 10-U-56** **Slip Opinion No. 1220** **Motion for Preliminary Relief**

DECISION AND ORDER

I. Statement of the Case

On October 8, 2010, the Washington Teachers' Union, Local 6, American Federation of Teachers, AFL-CIO (hereinafter "WTU" or "Complainant") filed an Unfair Labor Practice Complaint ("ULP" or "Complaint") against the District of Columbia Public Schools ("DCPS" or "Respondent"). The Complaint addressed both compensation and non-compensation matters. The Complainant alleged that the DCPS violated the Comprehensive Merit Protection Act ("CMPA") D.C. Code §1-617.04 (a) (1) and (5) by denying WTU's request for information related to performance ratings of bargaining unit members, by bargaining with individual bargaining unit members on terms and conditions of employment without the involvement and/or consent of the exclusive bargaining representative, by implementing a job requirement that bargaining unit members give up job tenure rights for excessed teachers as a condition for receiving a "pay-for-performance" award and by refusing to bargain on the impacts and effects of the "pay-for-performance" system.

The Complainant requested in its Complaint that the following relief be granted: 1) DCPS shall immediately provide WTU with the requested information of performance ratings of

bargaining unit members; 2)DCPS shall cease and desist from bargaining with individual bargaining unit members; 3)DCPS shall cease requiring individual qualified bargaining members to give up their job tenure rights for excessed teachers, unless DCPS bargains in good faith on impact, effects and implementation of the "pay-for-performance" system through conclusion of the statutory impasses procedure; and 4)DCPS shall post notices developed by PERB that acknowledge its commission of an unfair labor practice in this matter and said notices shall be posted on DCPS bulletin boards at each facility where bargaining unit members are assigned, and online at the DCPS web site. (See Complaint at p.4-5.)

On November 10, 2010, Respondents filed an Answer to the Complaint denying any violation of the CMPA. On October 22, 2010, the WTU petitioned the Public Employee Relations Board ("PERB") on a Motion for Preliminary Relief ("Motion"). On November 5, 2010, the Respondents answered the Complainant's Motion. The parties' pleadings are before the Board for disposition.

II. Discussion

The parties disagree with respect to the facts of this case.

The Complainants charge that: "1)DCPS'conduct is clear-cut and flagrant; 2) DCPS' refusal to bargain is an unfair labor practice complaint whereby the effect is widespread; 3) the public interest is seriously affected by DCPS' unfair labor practice; 4) the Board processes are being interfered with by DCPS' refusal [to] bargain; and 5) the Board's ultimate remedy may be clearly inadequate." (See Memorandum of Points and Authorities in Support of Motion for Preliminary Relief. P. 13-14.)

Respondents contend that in the Complainants' Motion for Preliminary Relief and accompanying Memorandum of Points and Authorities, the WTU incorrectly asserts that DCPS agreed to implement a "pay-for-performance" system for the 2010-2011 school year and cannot pay teachers for their performance following the 2009-2010 school year. The DCPS disputes this allegation by relying on the clear contractual language which it claims authorizes DCPS to pay employees for individual performance beginning in the fall of 2010, which it claims it has done. DCPS claims that WTU has admitted that DCPS has completed the required collaboration with WTU, and, consistent with the CBA, is now implementing the "pay-for-performance" system and preparing to pay bonuses to teachers. DCPS alleges that the WTU's argument that DCPS cannot pay bonuses in the fall of 2010 is inconsistent with the clear language of the CBA.

DCPS also disputes WTU's allegation that DCPS failed to bargain over the requirements that teachers who are eligible to receive bonuses forego any of the three options provided in Article 4.5.5.3 of the CBA. DCPS claims that they and WTU engaged in extensive negotiations that culminated in the execution of a new CBA that was ratified by WTU and approved by the Council on or about June 29, 2010. DCPS cites Article 4.5.6. entitled "Special Rules Governing the Placement of Excessed Permanent Status Teachers Who Quality for the DCPS Performance-Based Compensation System" and claims that Article 4.5.6.4 of the CBA specifically addresses the issue over which WTU is alleging DCPS is refusing to bargain.

DCPS further contends that its alleged failure to provide the union with the names, home and e-mail addresses, and amount of the financial award for teachers rated "highly effective" for the 2009-2010 school year would require disclosing the results of their respective evaluations. DCPS states that both District law (See 5 DCMR § 1315) and the CBA recognize that personnel information about an individual teacher is confidential and cannot be disclosed.[1]

Establishing the existence of an unfair labor practice requires that a determination cannot be made on these pleadings alone. The Board has determined that the circumstances presented do not appear appropriate to warrant a decision on the pleadings. As a result, the factual allegations raised in the Complaint are a matter best determined after the establishment of a factual record, through an unfair labor practice hearing.

The Board now turns to the Complainant's 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. 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.

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 [this 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, et al. v. FOP/DOC 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

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[1] "Under Article 5.1.1.2 of the CBA, for example, "A Teacher's official personnel file shall be treated as confidential." (emphasis added). Article 5.1.1.3 says "Documentation of a Teacher's performance shall be maintained in her/his official personnel file." And Article 5.1.2.3 requires that a WTU representative have "[W]ritten authorization from the Teacher" to view the teacher's personnel file. DCPS has repeatedly communicated to WTU that there are two easy ways to get the information it seeks: (1) have the teachers execute consent forms allowing DCPS to disclose this information to WTU; or (2) WTU could ask the teachers to identify themselves to WTU since they are their members, WTU has refused to use either of these readily-available options. In light of the above, DCPS disputes the material facts of this case and will more fully contest these facts when it submits its Answer." (See Response to Complainant's Motion for Preliminary Relief p.6-7)

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 (1988).

In the present case, the Complainants have not met the criteria of Board Rule 520.15. Even if the allegations are ultimately found to be valid, they do not establish that any of DCPS' actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. While the CMPA prohibits unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Complainants have failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.

We conclude that the Complainants have 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 Complainant following a full hearing. In view of the above, we deny the Respondent's Motion for Preliminary Relief. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met. In cases such 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).)

For the reasons discussed above, we: (1) deny the Complainants' Motion for Preliminary Relief; and (2) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainants' Motion for Preliminary Relief is denied.

2. 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.

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

4. Pursuant to Board Rule 559.2, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.
November 17, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and the Board's Decision and Order in PERB Case No. 10-U-56 are being transmitted via Fax and U.S. Mail to the following parties on this the 17th day of November, 2011.

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