Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2978,	
Complainant,	PERB Case No. 11-U-21
	Opinion No. 1275
vs.	
District of Columbia Department of Health,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 2978 ("Complainant" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") alleging that the District of Columbia Department of Health ("Respondent" or "Agency") violated 5 U.S.C. § 7116(a)(1) and (5), and D.C. Code § 1-617.04(a)(1),(2), and (5) by unilaterally changing a past practice without giving the Union notice of the proposed change and an opportunity to bargain.

Respondent did not file an Answer to the Complaint.

II. Discussion

The Union alleges that on November 1, 2010, the Agency unilaterally changed the past practice of allowing bargaining unit members employed by the Department of Health Community Health Administration ("CHA") to have three hours of administrative leave to vote in elections and referendums in their communities. (Complaint at 2-3).

Section 1266.14 of the District Personnel Manual ("DPM") states that "[a]s provided in section 1266.15 of this section, an employee shall be given administrative leave for the purpose

of voting in any election or referendum on a civic matter in his or her community." Section 1266.15 states:

> Where the polls are not open at least three (3) hours either before or after an employee's regular hours of work, an employee shall be granted an amount of administrative leave that will allow the employee to report for work three (3) hours after the polls open or leave work three (3) hours before the polls close, whichever requires the lesser amount of absence from duty.

Despite the DPM requirement that employees are only granted administrative leave when the polls are not open at least three hours either before or after an employee's regular work hours, the Union alleges that the Agency's past practice is to allow three hours of administrative leave without conditions. (Complaint at 3). The Union asserts that the past practice has existed for at least twelve years. *Id.*

The collective bargaining agreement between the Union and the Agency addresses administrative leave in Article 34, Section 3(D), which states that, "[d]uty time (Administrative Leave) may be granted for other purposes as provided by District Personnel Regulations. The preceeding [sic] shall not preclude eligibility for other leave that may be prescribed in the District's Personnel Regulations."

Respondent did not file an Answer to the Complaint. Board Rule 520.7 provides in pertinent part: "[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." 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. *See Virginia Dade v. National Ass'n of Government Employees, Service Employees International Union, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996). The Board has long held 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 D.C. Reg. 5163, Slip. Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

The Union alleges violations of both 5 U.S.C. § 7116(a)(1) and (5) and D.C. Code § 1-617.04(a)(1), (2), and (5). (Complaint at 3). 5 U.S.C. §7116 applies to federal government employees only, and is therefore outside the Board's jurisdiction. 5 U.S.C. § 7101; *see also* D.C. Code §§ 1-617.02, 1.617.04. Hence, the Board will address the alleged violations of the Comprehensive Merit Personnel Act ("CMPA") only.

As the Agency did not file an Answer, the Board must accept as fact: there is a past practice of allowing bargaining unit employees three hours of administrative leave to vote in elections, regardless of the restrictions set forth in Section 1266.15 of the DPM.

In the instant case, the Agency unilaterally changed a past practice when it ceased allowing three hours of unrestricted administrative leave to vote in elections. This unilateral change constitutes an unfair labor practice. *See District Council 20, American Federation of State, County and Municipal Employees, Locals 1200, 2776. 2401 and 2087 v. District of Columbia Government, et al.*, 46 DC Reg. 6513, Slip Opinion No. 590, PERB Case No. 97-U-15A (1999). Therefore, the Union's Complaint is granted.

Respondent must post a notice acknowledging its violation of the CMPA. The Board has recognized that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations." *Nat'l Assoc. of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Further, "it is in the furtherance of this end, *i.e.*, the protection of employee rights,...[that] underlies [the Board's] remedy requiring the post of a notice to *all employees* concerning the violation found and the relief afforded, notwithstanding the fact that all employees may not have been directly affected." *Bagentose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991).

Complainant requests that Respondent pay Complainant's costs in this matter. (Complaint at 4). The Board addressed the criteria for determining whether costs should be awarded in *AFSCME, D.C. Council 20, Local 2776 v. District of Columbia Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pp. 4-5, PERB Case No. 89-U-02 (2000):

> 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 fact 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 situation 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 reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

We find that under the circumstances of this case: (1) the Union prevailed in its Complaint; and (2) the Agency's conduct was undertaken in bad faith because it knew or should have known that a unilateral change to a past practice constitutes an unfair labor practice.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint is granted;

2. The District of Columbia Department of Health, its agents and representatives, shall cease and desist violating D.C. Code § 1-617.04(a)(1), (2), and (5) by unilaterally changing its policy for administrative leave for voting in elections;

3. The District of Columbia Department of Health shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to employees are normally posted. The Notice shall remain posted for thirty (30) consecutive days.

4. Within fourteen (14) days from the date of this Decision and Order, the Department of Health shall notify the Public Employee Relations Board in writing that the attached Notice has been posted accordingly.

5. The District of Columbia Department of Health will pay AFGE Local 2978's reasonable costs of litigating this matter.

6. Within fourteen (14) days from the issuance of this Decision and Order, the Complainant shall submit to the Public Employee Relations Board a written statement of actual costs incurred in processing this unfair labor practice complaint. The statement of costs shall be filed together with supporting documentation. The Department of Health may file a response to the Complainant's statement of costs within fourteen (14) days from the service of the statement of costs upon it.

7. 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 8, 2012.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-21 was transmitted via U.S. Mail and e-mail to the following parties on this the 8th day of June, 2012.

Mr. Robert Mayfield
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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH ("DOH"), 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. 1275, PERB CASE NO. 11-U-21 (June 8, 2012)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered DOH to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1), (2), and (5) by the actions and conduct set forth in Slip Opinion No. 1275.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

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 CMPA.

District of Columbia Department of Health

Date:_____ By:_____

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 any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

June 21, 2012