GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
University of the District of Columbia Faculty Association/nea, Complainant,	PERB Case No. 86-U-16 Opinion No. 215
and	
University of the District of Columbia, Respondent.	

DECISION AND ORDER

The Board remands this matter to the Hearing Examiner, with instructions that he require that the information described below be provided by the University of the District of Columbia (UDC) to the University of the District of Columbia Faculty Association/nea (UDCFA), that he re-evaluate the alleged violation of D.C. Code Section 1-618.4(a)(1) and (3) in light of this information and issue his findings thereon.

In the Report and Recommendation ("R&R") at p. 29, n.13, "The Hearing Examiner denied the Union's request to require [the University of the District of Columbia] to identify by name and score all faculty who were members of the bargaining unit from FY '82 through FY '86, received "Satisfactory" or better performance evaluations during that period, were eligible for step increases and did not receive them." The Hearing Examiner found this information in material on the basis of his findings of fact and conclusions of law, whereby he recommended that UDC be found to have violated the Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Code Section 1-618.4(a)(1) and (5) due to its refusal to bargain with the Union. The Hearing Examiner, however, declined to find a violation of D.C. Code Section 1-618.4 (a)(3) finding no specific evidence that UDC's acts were motivated by a desire to discourage union membership, nor did he find that UDC's acts were so inherently destructive of employee rights that no proof of anti-Union motivation was required. (R&R at p.31).

In its Exceptions, the University of the District of Columbia Faculty Association/nea ("UDCFA" or "Complainant") takes issue with the Hearing Examiner's denial of the information request, asserting "this information is material both to the Order he has recommended and to the Union's claim that the University discriminated against it in violation of Section 1704(a)(1) and (3) [D.C. Code Sections 1-618.4(a)(1) and (3)] of the Comprehensive Merit Personnel Act (hereinafter "CMPA")." (Complainant's Exceptions at p.2). UDC claims that the information may well prove, under the tests enunciated by the United States Supreme Court decision in NLRB v. Great Dane Trailors, 388 U.S. 26 (1967), that the employer's legitimate business justification for its actions were pretextual, thereby demonstrating a violation of D.C. Code Section 1-618.4(a)(3) [1]/ (UDCFA's Memorandum In Support of Exceptions, p.22-23).

We agree with UDCFA. The Board finds that the requested information is indeed material. This information goes directly to the defenses asserted by the University of the District of Columbia, as correctly noted by the Complainant. Thus the information could be probative as to the alleged violation of D.C. Code Section 1-618.4(a)(1) and (3), and should be provided to the Complainant.

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[1]/ NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), sets forth two tests for analyzing employer discrimination claims in the absence of specific evidence of employer anti-union animus as they relate to Section 8a(3) of the National Labor Relations Act. The first test applies if the employer's conduct is inherently destructive of employee rights, the second test is applicable if the effect of the employer's conduct is "relatively slight." "[I]n either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him." Id, at 34.

As the Hearing Examiner noted, the Comprehensive Merit Personnel Act of 1978 (CMPA) D.C. Code Section 1-618.4(a)(3) is substantially similar to Section 8(1)(3) of the National Labor Relations Act.

In its defense, UDC raises the Freedom of Information Act, D.C. Code Section 1-1524(A)(2), maintaining that employee privacy interests outweigh "the public interest purpose of those seeking disclosure." (UDC Pre-Hearing Brief at p.2). However, UDCFA is the exclusive bargaining representative and in accordance with D.C. Code Section 1-618.11(a) has the right to act for and represent the interests of the employees it represents.

The correct test is rather whether the information sought is relevant and necessary to the union's legitimate collective bargaining functions and whether this need is outweighed by confidentiality concerns. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). In this case, the information sought goes to the heart of the alleged D.C. Code Section 1-618.4(a)(1) and (3) violation pursuant to the placement of the burden of proof articulated in Great Dane, supra. Thus the need of the Union for the information clearly outweighs the confidentiality concerns expressed by UDC.

ORDER

IT IS ORDERED THAT:

This case is remanded to the Hearing Examiner, with instructions to act in accordance with this Decision and Order.

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

March 27, 1989

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: University of the District of Columbia Faculty Association/nea, Complainant, and University of the District of Columbia, Respondent.	PERB Case No. 86-U-16 Opinion No. 215 (Erratum)

ORDER

This Order corrects an error on page 2 of the Board's Slip Opinion in the above-captioned matter appearing at 36 DCR 2470 (April 7, 1989). In the first paragraph, the 9th line, the sentence beginning "UDC claims that the information may well prove..." is hereby corrected to the following: "UDCFA claims that the information may well prove..."

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

April 10, 1989