Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

Government of the District of Columbia
Public Employee Relations Board

Christopher Hawthorne, Complainant, v. District of Columbia Department of Transportation, and District of Columbia Office of Labor Relations and Collective Bargaining, Respondents.	PERB Case No. 09-U-61 Opinion No. 997 **Motion for Preliminary Relief**

DECISION AND ORDER

I. Statement of the Case:

On September 3, 2009, Christopher Hawthorne ("Complainant") filed a document styled "Verified Unfair Labor Practice Complaint and Request for Preliminary Relief" against the District of Columbia Department of Transportation ("DOT") and the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB") (collectively, "Respondents"). The Complainant alleges that the Respondents have violated D.C. Code §1-617.04 (a)(1), (3) and (4) by: (a) pursuing a continuing pattern and practice of retaliating against him in response to his involvement in protected activity; (b) discriminating against him in violation of the Comprehensive Merit Personnel Act to discourage membership in the Union; (c) failing to pay him back pay agreed upon by the parties in a settlement agreement and denying him the benefit of the bargain; (d) failing and refusing to process his grievances or to participate in the procedures necessary to submit his unresolved grievances to arbitration; and (e) failing to implement a settlement agreement involving a 14 day suspension and refusing to actually pay him the agreed-upon back pay owed to him by DOT as provided for in a settlement agreement. (See Compl. at pgs. 1-2).

The Complainant is requesting that the Board: (a) grant his request for preliminary relief; (b) order Respondents to cease and desist from acting to interfere, restrain and coerce Complainant in the exercise of his protected rights; (c) order Respondents to cease and desist

from discriminating and retaliating against the Complainant because of exercising his protected activities as a union officer, activist and employee grievant; (d) order Respondents to post a notice advising bargaining unit members that it violated the law; (e) order Respondents to pay interest on any back pay owed; (f) grant Complainant's request for costs and attorney fees; (g) order DOT to rescind any and all discipline imposed on the Complainant; (h) order Respondents to abide by and comply with its obligation to honor and respect Complainant's rights as set forth in D.C. Code §1-617.06; and (i) enjoin DOT from discharging the Complainant pending the resolution of the instant case because it involves allegations that DOT and OLRCB have a pattern and practice of ignoring the Complainant's arbitration demand. (See Compl. at pgs. 2, 14 and 15).

On September 17, 2009, the Respondents filed a document styled "Opposition to Petition for Preliminary Relief" ("Opposition"). In addition, on October 5, 2009, the Respondents filed an answer to the unfair labor practice complaint. In their submissions the Respondents: (1) deny violating the Comprehensive Merit Personnel Act ("CMPA"); and (2) request that Complainant's motion for preliminary relief ("Motion") be denied. (See Answer at p. 7 and Opposition at p. 7). The Complainant's Motion and Respondents' Opposition are before the Board for disposition.

II. Discussion:

The Complainant states that he "holds a position of Asphalt Lead Worker with the [DOT]." (Compl. at p. 5). The Complainant contends that during his employment with the District he has served as "a union officer including serving as the President of AFGE[, Local] 872. [He asserts that,] [s]ince commencing work with [DOT] he has been represented by and has been a member of a bargaining unit represented by AFGE Local 1975 and certain of the terms and conditions of [his] employment have been governed by the collective bargaining agreement in effect between AFGE Local 1975 and the Department of Transportation, including the provisions for grievance and arbitration procedures." (Compl. at pgs. 5-6).

The Complainant states that on or about October 26, 2007, he received notice of a proposal to suspend him for 14 days. The Complainant filed a grievance. The Union and the Respondents settled the grievance. (See Compl. at p. 6 and Answer at p. 3). However, the Complainant claims that DOT "has failed and refused to implement the Settlement Agreement and has subsequently cited and used the Settlement Agreement to support its allegations presented in other proposed adverse actions, specifically those proposals alleging 'Use of Abusive or Offensive Language/20-day suspension' and 'Insubordination/Termination'." (Compl. at p. 6).

On or about September 21, 2007, DOT made a detail assignment tranferring Complainant to the Pavement Marking Equipment Division for a period of 120 days. That detail was to end on February 21, 2008. The Complainant contends that upon completion of that detail the Complainant received a letter from Frank Pacifico reassigning him to the Traffic Services Field Operations Division (Pavement Marking) effective March 6, 2008. (See Compl. at pgs. 6-7). The Complainant asserts that he filed a grievance challenging DOT's: (1) failure to return him to work as an Asphalt Lead Worker; and (2) refusal to pay him back pay for the period of the detail when he worked at a higher grade. (See Compl. at pgs. 6-7). The parties settled the grievance. (See Compl. at p. 7 and Answer at p. 3). As a result, the Complainant claims that on May 29, 2008 he received "a letter [rescinding] the reassignment. . . .[and] directing [that effective June 9, 2008, he] return to his position as Asphalt Lead Worker. . . However, [the Complainant asserts that DOT] did not respond or pay the back pay [the Complainant] claimed and the grievance remained unresolved." (Compl. at p. 7).

The Complainant states that on July 10, 2008, he filed another grievance regarding DOT's continuing failure to honor its obligation to pay him properly for the work he performed while on detail to the Pavement Marking Division. (See Compl. at p. 7). The Complainant contends that this grievance reached Step 4 of the Grievance and Arbitration Procedure and on September 11, 2008, the grievance was submitted to DOT's Director. The Complainant claims that he "subsequently received a letter . . .which acknowledged that [DOT] owes [the Complainant] back pay for [the] work [performed while] on. . .detail. [However, the Complainant asserts that,] [t]o date, [he] has not been paid the back pay the [DOT] conceded he is owed." (Compl. at p. 7).

The Complainant contends that following receipt of the May 29, 2008 letter which rescinded his reassignment, he has experienced reprisals for filing a grievance concerning his detail.[1] (See Compl at p. 7). For example, the Complainant states that he was notified that a manager had alleged he had engaged in misconduct; therefore, on June 11, 2008 and June 17, 2008 the Complainant wrote to Charles Stewart, Superintendent, and to Terry Bellamy, Associate Director of Traffic Operations Administration, to: (1) "address his proper status as an Asphalt Lead Worker"; and (2) "respond to the baseless allegations of misconduct lodged against him by another DOT manager, Frank Pacifico." (Compl. at p. 8). However, the Complainant claims that the issue was not resolved. As a result, he filed another grievance. The Complainant states that this "grievance reached Step 4 of the grievance procedure. . . [Subsequently,] Local 1975. . . wrote to. . . [the] Acting Director for DOT, regarding the unresolved grievance relating to. . . [the] harassment and retaliation [the Complainant] was experiencing. [The Complainant claims DOT] defended Mr. Pacifico's actions in its response to the Step 4 grievance but failed to meet with Local 1975 and [the Complainant] to set a date for mediation of two unresolved grievances initiated by [the Complainant]." (Compl. at p. 8).

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[1] The Complainant claims that the grievance was filed to ensure that he would be returned to his position of record at the conclusion of the detail. (See Compl at p. 7).

As further evidence of the alleged retaliation, the Complainant states the following:

> On or about August 18, 2008, Respondent [DOT's] managers, Frank Pacifico and Anthony Owens acted to deprive [Complainant] of Union representation by deceiving him and his Union representative, AFGE Local Vice President, Tommy Bell, by announcing that a scheduled meeting had to be cancelled so that Mr. Bell, the Union Officer present was induced to leave only to then direct [Complainant] to appear individually so as to isolate him when he was then told by a [DOT] supervisor that as an experienced former union officer he should not be filing grievances through the Union but should instead simply speak with . . .[DOT's] managers when he had a concern that [DOT] had acted in violation of the parties' Agreement. On November 26, 2008 and December 2, 2008, [DOT] managers, including Terry Bellamy and Frank Pacifico summoned [Complainant] to meetings at which they chastised him that as a former union officer he should not be filing [] grievances that they were then required to address.
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> On December 21, 2008, Clifford Lowery, President of AFGE Local 1975, wrote to Terry Bellamy, Associate Director (TOA), with respect to the need to implement [DOT's] promise to resolve two open grievances initiated by [the Complainant]: the one. . . involving the harassment and retaliation by Frank Pacifico, and a second involving the failure of Anthony Owens, another [DOT] supervisory employee, to report the hostile and threatening behavior of another employee towards [the Complainant]. . . both [] matters the parties had agreed to resolve through mediation in accordance with the grievance and arbitration procedures article in the parties' Agreement.
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> By his letter dated November 18, 2008, [the Complainant] wrote to [DOT] Chief of Staff Reginald Bazile to address and respond to inaccuracies in the latter's October 23, 2008 letter acknowledging that [Complainant] was owed back pay for the G Street detail. After a further exchange of letters with Terry Bellamy regarding this issue, [the Complainant] initiated a grievance which reached Step 4 on April 10, 2009, when it was filed with the new Director

of [DOT], Gabe Klein. Subsequently, on May 6, 2009, AFGE Local 1975 President Lowery wrote to Director Klein to provide notice to the [DOT] of its request to submit the unresolved grievance regarding [Complainant's] back pay to arbitration, and Lowery also wrote to Natasha Campbell, Director of the OLRCB, that same day to provide notice that the Local was initiating arbitration of [the Complainants's] unresolved grievance involving the back pay the [DOT] owed him for the work he performed while on. . . detail in 2007-2008. Notwithstanding the Local's timely notice, Respondent OLRCB has failed and refused to participate in commencing the arbitration process as provided for in the parties' Agreement, and [Complainant] continues to await payment of the back pay [DOT] has admitted it owed him.

As noted above, in reprisal for [Complainant's] request that Owens' report the profane and abusive language directed at him as well as the assaultive behavior of his fellow employee, [the Complainant] was detailed to the Bridge Maintenance Division on August 22, 2008. . . AFGE Local 1975, . . . wrote to Mr. Bellamy on December 21, 2008, asserting that [DOT's] actions revealed that it was reneging on its promise to resolve this matter that involve[d] retaliation against [the Complainant], through the negotiated mediation procedures of the parties' Agreement. . .To date, the OLRCB has not responded nor has it participated in the submission of this unresolved grievance to arbitration.

On December 10, 2008, [Complainant] received a notice of proposal to suspend him for 20 days based in part on an alleged incident involving General Foreman Deas. On December 16, 2008, [Complainant] submitted a timely response to the notice of proposal to suspend and supported his response with affidavits of witnesses. On January 15, 2009, AFGE Local 1975 gave [DOT] notice that General Foreman Deas had created a hostile working environment for [Complainant]. Nevertheless, [DOT] issued a final agency decision to suspend [Complainant] on January 29, 2009. [Complainant's]. . . grievance challenging the 20-day suspension reached Step 4 on March 13, 2009, when it was filed with [DOT] Director Klein. Thereafter, the grievance remained unresolved and on May 6, 2009, Mr. Lowery, President of AFGE Local 1975, wrote to Director Klein to provide notice to [DOT] of its request to submit the unresolved grievance regarding the [DOT's] decision to suspend [Complainant] for 20 days to

> arbitration, and Lowery wrote to Natasha Campbell, Director of the OLRCB, that same day to provide notice that the Local was initiating arbitration of [Complainant's] unresolved grievance involving the 20-day suspension. The OLRCB has not responded nor has it participated in the submission of this unresolved grievance to arbitration. (Compl, at pgs. 8-13).

The Complainant contends that by the conduct described above, the Respondents are violating D.C. Code § 1-617.04(a)(1), (3) and (4). (See Compl. at pgs. 1 and 14). Specifically, the Complainant argues that the:

> Respondents' failure and refusal to process Complainant's. . . grievances through to final and binding arbitration and failure to pay him the back pay it owes him is in retaliation for his invocation of his protected right as a District employee to initiate grievances and to persist in pursuing resolution of his grievances as well as for his protected activity of serving as a union officer and being a known union activist advocating that his fellow bargaining unit members know and rely upon the provisions of the parties' Collective Bargaining Agreement. (Compl. at p. 13).

The Complainant is requesting that the Board grant his request for preliminary relief. In support of his position, the Complainant asserts the following:

> Complainant . . . requests that the Board provide him preliminary relief in the instance under the exigent circumstances existing at present pursuant to Rule 520.15. (Compl. at p. 2).

Board Rule 520.15 provides in pertinent part as follows:

> 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.

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 bas[is] 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).

In its response to the Motion, the Respondents assert that the Complainant's request for preliminary relief should be denied because the Complainant has failed to meet any of the elements necessary for obtaining preliminary relief. (See Opposition at p. 4). In support of its position the Respondents assert the following:

> This case has no merit. It is late. Some of the events allegedly happened eighteen months to two years ago. Seeking preliminary relief universally implies emergency and surprising recent action by the defendant or respondent. That test is not met with two-year old claims and only one claim within PERB's statute of limitations. The case does not meet any of the standards of the PERB rule establishing the requirements for a grant of preliminary relief. For all the forgoing reasons, DOT and OLRCB urge PERB to deny preliminary relief. (Opposition at pgs. 5-6).

Furthermore, the Respondents dispute the Complainant's version of events and specifically dispute that DOT has failed and refused to implement the parties' settlement agreement as retaliation for Complainant's union activities. Instead, the Respondents assert that "because the [Complainant] will not cooperate with [DOT] to complete the settlement, the grievance remains unsettled." (Answer at p. 3). The Respondents requests that the Board: (1) find that Respondents have not committed an unfair labor practice; and (2) deny the Complainant's request for preliminary relief. (See Answer at p. 7 and Opposition at p. 7).

After reviewing the parties' pleadings it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. 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 Corporation,* 45 DCR 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

In the present case, the Complainant requests preliminary relief; however, he has not provided any argument addressing the specific standard for granting preliminary relief.(i.e. 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). Instead, the Complainant "requests that the Board provide him preliminary relief in the instance under the exigent circumstances existing at present pursuant to Rule 520.15." (Compl. at p. 2). Thus, the Complainant's claim that Respondents' actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of Respondents' actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOT's actions presumably affect the Complainant. However, DOT's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. Also, the record thus far does not show that the alleged violations have tangibly affected any bargaining unit member other than the Complainant. While the CMPA prohibits the District, its agents and representatives from engaging in 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 Complainant has 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 Complainant has failed to provide evidence which demonstrates that the allegations, even if true, are such that 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.

For the reasons discussed above, we deny the Complainant's request for preliminary relief. As a result, we direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's Motion for Preliminary Relief is denied.

2. The Board's Executive Director shall refer this matter to a Hearing Examiner for development of a factual record through an unfair labor practice hearing. Pursuant to

Board Rule 550.4 the Notice of Hearing shall be issued fifteen days prior to the date of the hearing.

3. 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.

December 29, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-61 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of December 2009.

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