Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, AFL-CIO, Local 872,	
Complainant,	PERB Case No. 13-U-19
	Opinion No. 1441
v.	
	Motion for Preliminary Relief
District of Columbia Water and Sewer Authority,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, AFL-CIO, Local 872 ("Complainant" or "AFGE" or "Union") filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief ("Complaint") against the District of Columbia Water and Sewer Authority ("Respondent" or "WASA" or "Agency"), alleging WASA violated D.C. Code §§ 1-617.04(a)(1), (3), and (5) ("Comprehensive Merit Personnel Act" or "CMPA"), by 1) engaging in "a campaign of continuing harassment" against Chief Shop Steward, Kevin Jenkins ("Mr. Jenkins") and the officers of Local 872; 2) telling union officers and stewards not to consult with the union; 3) accusing employees and union officers of conducting union business when they speak with one another; 4) causing Mr. Jenkins to feel he cannot speak freely with employees; 5) causing members to be fearful of their right to representation by the Union; 6) informing Local 872 President, Jonathan Shanks ("Mr. Shanks") that he might be disciplined as a result of a complaint that had been raised by April Bingham ("Ms. Bingham"); 7) conducting an investigation of workplace violence complaints against Mr. Jenkins; and 8) refusing to provide documents the Union had requested in accordance with Article 18 of the parties' Collective Bargaining Agreement ("CBA"). (Complaint).

In addition, AFGE moved for preliminary relief pursuant to PERB Rule 520.15, arguing that WASA's alleged violations of the CMPA were "intentional and flagrant". *Id.*, at 4.

In its Answer, WASA denied it violated the CMPA as alleged and raised several affirmative defenses. (Answer). WASA further denied that AFGE is entitled to preliminary relief. *Id.*

II. Background

On November 26, 2012, Mr. Jenkins was placed on administrative leave in accordance with Article 57, Section K(1)(a) (governing discipline) of the CBA due to allegations that he had created a "hostile work environment" and violated WASA's Workplace Violence policy. (Complaint, at 2); and (Answer, at 2). As a result, Mr. Jenkins was asked to turn in his badge and leave the premises. *Id.* AFGE argues this action marked the beginning of a "campaign of continuing harassment against Mr. Jenkins ... because [he] had filed grievances against [WASA's] managers." (Complaint, at 2). WASA denies that such was the reason and instead contends it "had reasonable cause to place Mr. Jenkins on paid administrative leave" because approximately nine (9) employees had had filed written complaints accusing Mr. Jenkins of creating a hostile work environment. (Complaint, at 2); and (Answer, at 2).

As part of the investigation, Mr. Jenkins was interviewed by WASA Facilities and Security Manager, James Hollaway. *Id.* During the interview, Mr. Jenkins requested copies of the written complaints that had been filed against him but WASA denied that request. *Id.* WASA contends it had legitimate business reasons for denying Mr. Jenkins' request, such as the investigation was still ongoing, and because allegations of workplace violence are "highly sensitive in nature and require confidentiality in order to ensure maximum cooperation by employees." (Answer, at 2-3).

On January 7, 2013, WASA Customer Care and Operations Assistant General Manager Charles Kiely ("Mr. Kiely") and Labor Relations and Compliance Programs Manager C. Mustaafa Dozier ("Mr. Dozier") notified Mr. Jenkins that the workplace violence complaints had not been substantiated and that he could return to work without restrictions. (Complaint, at 2-3). At the meeting, Mr. Kiely directed Mr. Jenkins to notify his supervisor when he would be conducting union business. (Complaint, at 3); and (Answer, at 3). AFGE asserts Mr. Jenkins had "never failed to request and inform his supervisors when he was performing union business." (Complaint, at 3). WASA denies that assertion. (Answer, at 3).

When Mr. Jenkins reported back to work on January 14, 2013, his immediate supervisor, Leia Marshall ("Ms. Marshall"), asked to meet with him. (Complaint, at 3). AFGE alleges that Mr. Jenkins contacted Mr. Dozier to inquire about the meeting, and that Mr. Dozier informed Mr. Jenkins that based on comments Mr. Jenkins made in the January 7 meeting, Mr. Dozier believed Mr. Jenkins needed to enroll in COPE, an employee assistance program, because "Mr. Jenkins had a problem with women in authority positions." *Id.* WASA denies these allegations, but confirms that Mr. Dozier met with Mr. Jenkins on January 14 and discussed Mr. Jenkins'

possible enrollment in COPE. (Answer, at 3-4). WASA asserts Mr. Jenkins was not "required" to enroll in the program and that as of the date of its Answer, WASA had not referred him to the program. *Id.* WASA further asserts that Mr. Jenkins "refused to meet with Ms. Marshall" when she requested to meet with him on January 14. *Id.*

AFGE alleges Mr. Jenkins complained about Mr. Dozier's suggestion to WASA Support Services Assistant General Manager Katrina Wiggins ("Ms. Wiggins"), but that "Ms. Wiggins took no action on Mr. Dozier's statements." (Complaint, at 3). WASA asserts Ms. Wiggins informed Mr. Jenkins that the referral to COPE "was a suggestion, not a requirement, and that there was a reasonable basis to refer Mr. Jenkins to such program." (Answer, at 4).

AFGE alleges that because of these actions, "[b]argaining unit members ... have become fearful of speaking to union officers and stewards and have been told not to consult with the union"; that when union officers speak to employees, "the employees and union officers are accused of conducting union business"; and that WASA's treatment of Mr. Jenkins "has limited his interaction with bargaining unit members and caused Mr. Jenkins to feel he cannot speak freely with employees." (Complaint, at 3-4). AFGE further alleges that WASA's actions were "intentional and flagrant acts taken in disregard of the Union's rights as the exclusive representative of employees" and that the actions "were designed to and have interfered with Local 872's right to represent its bargaining unit members without fear, restraint, and coercion." (Complaint, at 4). Additionally, AFGE alleges that WASA's actions have caused the Union to be "regarded as ineffective by employees"; that they have "diminished the Chief Shop Steward's standing among his coworkers and bargaining unit members and acted as a restraint upon [his] right to carry out his duties of representation"; and that they "pose a continuing threat to the Union's right to represent bargaining unit members and create[d] a chilling effect on the rights of the exclusive representative, which is in violation of the public interest." *Id.* Based on these allegations, AFGE moved PERB to grant it preliminary relief under PERB Rule 520.15 and order WASA to cease and desist said actions. *Id.*, at 4-5. WASA denies these allegations and denies that AFGE is entitled to preliminary relief. (Answer, at 4-5).

In addition to the above allegations that form the basis of AFGE's request for preliminary relief, AFGE alleges WASA violated the CMPA and committed other unfair labor practices when it informed Mr. Shanks that he might be disciplined as a result of a complaint that had been raised by Ms. Bingham after a Labor-Management meeting; when it conducted its workplace violence investigation against Mr. Jenkins; and when it refused to provide documents related to Mr. Jenkins' workplace violence investigation that AFGE had requested in accordance with Article 18 of the parties' Collective Bargaining Agreement ("CBA"). (Complaint, at 5-6). WASA denies that Mr. Shanks was informed he might be disciplined as a result of Ms. Bingham's complaint; that its investigation of the workplace violence complaints against Mr. Jenkins violated the CMPA; and that its denial of AFGE's request for documents violated the CMPA. (Answer, at 5-7). WASA further asserts that after it provided AFGE with the reasons why it denied the information request, AFGE "never proffered an explanation as to why the information requested was relevant to the Union as the bargaining representative of certain employees." *Id.*, at 6.

WASA further denies that AFGE is entitled to its requested relief and raises the affirmative defenses that: 1) it had legitimate non-discriminatory reasons for the actions it took against Mr. Jenkins; 2) Mr. Jenkins suffered no loss of pay or damage as a result of its actions; 3) it had legitimate business reasons for withholding the information requested by the Union; 4) the Union failed to explain the relevance of its information request; 5) WASA's actions were conducted in accordance with the express management rights set forth in D.C. Code § 1-617.08 and Article 4 of the CBA; 6) the Complaint fails to state a cause of action upon which relief can be granted; 7) the Union is not entitled, on the law or the facts, to the relief requested, including but not limited to its request of attorneys' fees and costs; 8) some of AFGE's allegations may not be timely; and 9) PERB does not have jurisdiction over allegations that would require it to interpret the parties' CBA. *Id.*, at 7-9.

III. Discussion

Motions for preliminary relief in unfair labor practice cases are governed by PERB Rule 520.15, which in pertinent part provides:

> 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.

American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO, Locals 2091, 2401, 2776, 1808, 877, 709, 2092, 2087, and 1200, et. al. v. District of Columbia Government, 59 D.C. Reg. 10782, Slip Op. No. 1292, PERB Case No. 10-U-53 (2012).

Additionally, the Board's authority to grant preliminary relief is discretionary. *Id.* (citing *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools, D.C. Council 20, et al. v. District of Columbia Government, et al.*, 42 D.C. Reg. 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992)). In determining whether to exercise its discretion under Board Rule 520.15, the Board applies the standard stated in *Automobile Workers v. National Labor Review Board*, 449 F.2d 1046 (D.C. 1971). *Id.* In *Automobile Workers, supra*, the D.C. Court of Appeals held that irreparable harm need not be shown. *Id.* However, the supporting evidence must "establish that there is reasonable cause to believe that the [the applicable statute] has been violated, and that the remedial purposes of the law will be served by *pendente lite* relief." *Id.* "In those instances where [the 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." *Id.* (citing *Clarence Mack, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al*, 45 D.C. Reg. 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997)).

PERB Rule 520.8 states: "[t]he Board or its designated representative shall investigate each complaint." Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." However, Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties." (Emphasis added).

Here, AFGE's only justification for seeking preliminary relief is its assertion that WASA's actions were "intentional and flagrant" (which WASA denies). (Complaint, at 4). The Board finds that such a claim, by itself, does not constitute sufficient evidence to demonstrate that the effects of WASA's alleged actions against Mr. Jenkins are "widespread", are "seriously" affecting the public interest, that PERB's processes are being interfered with, and/or that PERB's ultimate remedy would be "clearly inadequate."[1] *See* PERB Rule 520.15. Furthermore, the Board finds that the pleadings currently in the record do not present enough evidence to definitively conclude that WASA violated the CMPA as alleged and therefore similarly fail to demonstrate a reasonable cause to establish that the remedial purposes of the law in this matter would be best served by *pendente lite* relief. *AFSCME, et. al. v. D.C. Gov't, supra*, Slip Op. No. 1292, PERB Case No. 10-U-53. As a result, the Board, in its discretion, denies AFGE's motion for preliminary relief. *Id.*

Based on the foregoing, and in light of WASA's denial that its actions violated the CMPA as well as its affirmative defenses, the Board finds that the parties' pleadings present an issue of fact that cannot be resolved on the pleadings alone. Therefore, pursuant to PERB Rule 520.9, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. See also PERB Rule 520.8; and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5957, Slip Op. No. 999, PERB Case 09-U-52 (2009).

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[1] AFGE included with its Complaint an Affidavit from Mr. Jenkins, in which he provides his account of WASA's alleged actions against him. (Complaint Exhibit 2). While Mr. Jenkins contends that since his return, "employees are afraid to be seen speaking with me", that they have informed him they have been told not to seek advice and representation from the union, and that WASA's actions "have had a chilling effect on me and have interfered with my ability to carry out my duties as the Chief Shop Steward", he does not indicate how many employees have told him those things. *Id.* As such, it is impossible for the Board to determine at this time whether the alleged effects of WASA's actions are indeed "widespread"; are "seriously" affecting the public interest; and/or whether its ultimate remedy would be "clearly" inadequate. See PERB Rule 520.15.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's request for preliminary relief is denied.

2. PERB shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and make appropriate recommendations in accordance with said record.

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

4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-19, Slip Op. No. 1441, was transmitted via File & ServeXpress™ and e-mail to the following parties on this the 13th day of November, 2013.

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