Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Nurses Association,	
Complainant,	PERB Case No. 09-U-07
v.	Opinion No. 1336
District of Columbia Department of Mental Health,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant, District of Columbia Nurses Association ("Union" or "DCNA"), filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondent, District of Columbia Department of Mental Health ("Agency" or "Respondent"), for alleged violations of sections 1-617.04(a)(1) and (5)[1] of the Comprehensive Merit Protection Act ("CMPA"). Specifically, DCNA alleges that the Agency failed to respond to a request for information. (Complaint at 2). Respondent filed an Answer and Affirmative Defenses ("Answer") in which it denies the alleged violations and raises the following affirmative defenses:

> (1) DCNA has requested information of which DMH is not the custodian. DMH has requested the information sought by DCNA from the Office of Pay and Retirement and will forward to DCNA upon receipt;
>
> (2) Addressee of the October 8, 2008, e-mail transmission has no recollection of receipt of the request;

[1] The Complaint alleges violations of D.C. Code § 1-618.4(a)(1) and (5). These statutes have been recodified at D.C. Code § 1-617.04(a)(1) and (5).

> (3) DCNA failed to perform due diligence in seeking the requested information. Follow-up telephone calls and/or written correspondence transmitted through the U.S. Postal Service or personal delivery, or rais[ing] the subject matter in the reoccurring monthly labor-management meeting, [is] more appropriate than filing an unfair labor practice complaint;
>
> (4) DCNA's Unfair Labor Practice Complaint should be dismissed because the complaint fails to state an unfair labor practice for which relief may be granted; and
>
> (5) DCNA has failed to allege facts, which, if true, would constitute interfering with, restraining, or coercing any employee in the exercise of the rights prohibited by D.C. Code Section 1-617.04(A)(1) and therefore fails to state a claim of unfair labor practice. The complaint alleges no specific action or conduct by the Respondent, which supports a finding of prohibited action.

(Answer at 4-5).

The question before the Board is whether the Agency's failure to respond to DCNA's request for information constitutes an unfair labor practice, in violation of D.C. Code §§ 1-617.04(a)(1) and (5).

II. Discussion

DCNA alleges that on or about October 8, 2008, it sent a request for information to Ms. Frankie Wheeler, Director of Human Resources for the Department of Mental Health. (Complaint at 2, Complaint Ex. 1). The information request stated:

> It has recently come to my attention that the [Agency] has provided retroactive pay increases for FY2008 in accordance with the collective bargaining agreement. Unfortunately, it is my understanding that such increases were included in each employee's regular pay check. As a result, DCNA has received numerous inquiries concerning the accuracy of the retroactive pay calculation. Accordingly, kindly provide this office with the calculations utilized to determine the retroactive payment for each bargaining unit employee.

(Complaint at 2). The Agency "neither admits nor denies that the October 8, 2008, e-mail transmission was actually received and/or read by the recipient." (Answer at 3). The Agency admits that no information was forwarded in response to DCNA's October 8, 2008, request. *Id.*

DCNA sent follow up e-mails to the Agency on October 23, 2008, and November 19, 2008. (Complaint at 2, Complaint Ex. 1). The Agency neither admits nor denies that these communications were received and/or read by their recipient, and states that the request for information was presented to the Agency during a November 20, 2008, labor-management meeting. (Answer at 3-4). The Agency admits that no documents have been provided in response to DCNA's request for information. (Answer at 4).

The Board has held that "an agency is obligated to furnish requested information that is both relevant and necessary to a union's role in: (1) processing of a grievance; (2) an arbitration proceeding; or (3) collective bargaining," and that a failure to do so is an unfair labor practice. *FOP/MPDLC v. MPD*, Slip Op. No. 1131 at p. 4, PERB Case No. 09-U-59 (Sept. 15, 2011).

A review of the parties' pleadings makes clear that: (1) the Agency acknowledges that DCNA made at least one request for information and that the Agency failed to comply with the request; (2) the Agency has not provided the information requested by DCNA in response to its request; and (3) the Agency has not articulated any viable defense with respect to its failure to respond to the information request. Because of these undisputed facts, there is no issue of fact warranting a hearing, and the matter can appropriately be decided on the pleadings pursuant to Board Rule 520.10.

The information requested by DCNA related to retroactive pay increases for fiscal year 2008, made in accordance with the parties' collective bargaining agreement. (Complaint at 2). DCNA sought the information in order to determine the accuracy of the payments to its members. *Id.* We find that the requested information is both relevant and necessary to a legitimate collective bargaining function to be performed by the union.

Therefore, by failing to provide DCNA with the requested information, the Agency has violated D.C. Code § 1-617.04(a)(1) and (5), and thereby committed an unfair labor practice. *See Council of School Officers, Local 4 v. D.C. Public Schools*, Slip Op. No. 977 at p. 8, PERB Case No. 08-U-53 (Aug. 28, 2009); *Int'l Brotherhood of Police Officers, Local 445 v. D. C. Dep't of Administrative Services*, 43 D.C. Reg. 1484, Slip Op. No. 401 at p. 4, PERB Case No. 94-U-13 (1996).

The Agency raises five affirmative defenses, but none constitute a viable defense for the Agency's failure to respond to DCNA's information request. The Agency first states that it is not the custodian of the information requested by DCNA, and that it requested the information from the Office of Pay and Retirement. (Answer at 4). The Agency itself admits that it has the ability to obtain information responsive to DCNA's request, yet it did not do so after DCNA's October 8, 2008, request and subsequent follow-up e-mails. *Id.*

Equally unpersuasive are the Agency's affirmative defenses that the "[a]ddressee of the October 8, 2008, e-mail transmission has no recollection of receipt of the request," and that DCNA should have followed up via phone call, written correspondence transmitted through the U.S. Postal Service or personal delivery, or in person. (Answer at 4-5). Further, as discussed above, DCNA has successfully stated an unfair labor practice for which relief can be granted,

and has alleged facts in support of its unfair labor practice claim. Therefore, the Agency's affirmative defenses are dismissed.

DCNA requests the following relief:

a) The Agency immediately provide the requested information described in the DCNA correspondence, dated October 8, 2008;

b) The Agency post appropriate notice of the violation of law in all areas where bargaining unit employees work; and

c) Any and all other relief deemed appropriate by the PERB, including costs.

(Complaint at 3).

The Board will order the Agency to cease and desist violating D.C. Code §§ 1-617.04(a)(1) and (5), provide DCNA with the information described in the October 8, 2008, correspondence between DCNA and the Agency, and the Agency will post a notice.

D.C. Code § 1-617.13(d) provides that "[t]he Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." 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. 98-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.

In the instant case, DCNA was successful in its case, and an award of reasonable costs is in the interest of justice. The Board has long held that "an agency is obligated to furnish requested information that is both relevant and necessary to a union's role in: (1) processing of a grievance; (2) an arbitration proceeding; or (3) collective bargaining," and that a failure to do so is an unfair labor practice. *FOP/MPDLC*, Slip Op. No. 1131 at p. 4. The Agency's position to the contrary is wholly without merit.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant District of Columbia Nurses Association's Unfair Labor Practice Complaint is granted.

2. The District of Columbia Department of Mental Health will cease and desist violating D.C. Code §§ 1-617.04(a)(1) and (5) by refusing to respond to the Complainant's October 8, 2008, information request.

3. The District of Columbia Department of Mental Health shall provide the requested information to the Complainant within ten (10) days from the issuance of this Decision and Order.

4. The District of Columbia Department of Mental Health shall pay reasonable costs to the Complainant.

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

6. The District of Columbia Department of Mental Health shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that the Notice has been posted accordingly;

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.

October 19, 2012

PERB Public Employee Relations Board

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DC.gov

1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF MENTAL HEALTH ("DMH"), 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. 1336, PERB CASE NO. 09-U-07 (October 19, 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 DMH to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No.1336.

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 respond to the District of Columbia Nurses Association's information request dated October 8, 2008, within ten (10) days from the issuance of Slip Opinion No. 1336.

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 Mental 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.

October 19, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-07 was transmitted to the following parties on this the 19th day of October, 2012.

Ms. Frankie T. Wheeler
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