

information request. (Complaint, at 1-8). In addition, AFGE stated that it believes OLRCB's attorneys advised FEMS to not comply with the Order and thus further violated the CMPA. *Id.*, at 5-6.

In their Answer, FEMS and OLRCB denied that either had refused to comply with the Order and information requests. (Answer, at 1-7). FEMS and OLRCB asserted that much of the requested information had been provided and that more time was needed to accumulate the information necessary to be able to comply with the remainder of the information requests and the Order as a whole. (Answer, at 5, 7). FEMS and OLRCB denied the allegation that OLRCB's attorneys advised FEMS not to comply with the Order. *Id.*, at 5. In addition, FEMS & OLRCB raised the affirmative defense that AFGE failed to state a cause of action for which relief may be granted. *Id.*, at 7.

The parties thereafter filed numerous other pleadings and motions in this matter, as detailed below. Furthermore, the parties participated in mediation, but were unable to reach a resolution.

II. Background

On November 24, 2009, AFGE prevailed over FEMS in an arbitration proceeding regarding uncompensated overtime hours for approximately 232 paramedics and EMT's dating back to October 31, 2006 ("Award"). (Complaint, at 1-3, 7). Specifically, the Arbitrator ordered:

The Agency shall compensate the FEMS paramedics and EMT's appropriate overtime pay for the previously uncompensated hours worked over 40 hours in a workweek from October 31, 2006, forward. An amount equal to the overtime [backpay] ordered herein is ordered to be paid those employees as liquidated damages. The Agency is directed to pay the Union reasonable attorney's fees and costs associated with this grievance. *Id.*, at 3.

FEMS thereafter filed an Arbitration Review Request asking PERB to review the Award. *Id.*, at 4. On April 25, 2012, PERB issued its Order sustaining the award. *Id.*; and Slip Op. No. 1258, *supra*. FEMS did not appeal the Order. *Id.* In the months that followed, AFGE sent multiple emails to FEMS demanding compliance with the Order. *Id.*, at 4-5. Additionally, AFGE submitted an information request to OLRCB seeking documents to help it determine for itself the exact amounts owed pursuant to the Award. *Id.*

On August 13, 2012, AFGE filed the instant Complaint, alleging that Respondents had failed to comply with both the Order and the information request. *Id.*, at 5. AFGE further alleged that, upon its own information and belief, OLRCB's Director, Natasha Campbell ("Director Campbell"), and OLRCB Attorney-Advisor Dennis Jackson ("Mr. Jackson"), "advised DC FEMS that it should not pay the amounts owed to the employees until the PERB issues an enforcement order¹ of [Slip Op. No. 1258, *supra*]." *Id.*, at 5-6.

In addition, AFGE contended that the Respondents' on-going refusal or failure to comply with the award, without a legitimate reason, constituted a failure to bargain in good faith, in violation of D.C. Code §§ 1-617.04(a)(1) and (5). *Id.*, at 6 (citing *American Federation of Government Employees, Local 872, AFL-CIO v. District of Columbia Water and Sewer Authority*, 46 D.C. Reg. 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996)). Further, AFGE contended that the Respondents' failure and refusal to timely respond to the information request also constituted a failure to bargain in good faith, in violation of D.C. Code §§ 1-617.04(a)(1) and (5). *Id.*, at 7-8 (citing *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, 59 D.C. Reg. 6003, Slip Op. 1003, PERB Case No. 09-U-65 (2009); and *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 D.C. Reg. 8356, Slip Op. No. 597 at p. 2, PERB Case No. 99-U-23 (1999)).

To remedy these alleged violations, AFGE requested that PERB order Respondents to cease and desist from failing and refusing to comply with the Award and Order and the information request. *Id.*, at 8. Further, AFGE requested that PERB order Respondents to post a notice detailing their alleged violations of the CMPA. *Id.*

In their Answer, filed on September 4, 2012, Respondents denied that they had "refused" to comply with either the Order or the information request. (Answer, at 1-6). Rather, Respondents asserted that they fully intended to comply with both, but needed more time to do so. *Id.*, at 5-6. Respondents contended that the large amount of data that needed to be collected and calculated made it unreasonable for AFGE to expect full compliance with the Order within three (3) months after it became final. *Id.* Respondents further asserted that on August 14, 2012, FEMS provided AFGE "with a large amount of the information requested, and advised the Union that the remainder would be provided once it was retrieved from the former D.C. [payroll] system[.]" *Id.*, at 6-7. Respondents denied that OLRCB, Director Campbell, or Mr. Jackson ever advised FEMS to not comply with PERB's Order and alleged that AFGE's allegation of the same was "defamatory" and "not supported by any evidence." *Id.*, at 5. Lastly, Respondents

¹ In addition to the instant Unfair Labor Practice Complaint, AFGE also filed an Enforcement Petition ("PERB Case No. 12-E-06") with PERB on August 10, 2012, alleging that FEMS had failed to comply with the Order by the deadline set by PERB's Rules.

raised the affirmative defense that the Complaint failed to state a cause of action for which relief may be granted by PERB. *Id.*, at 7.

On December 21, 2012, AFGE filed an Amended Complaint to add the additional allegations that: 1) Respondents had “continued to fail to bargain in good faith [in violation of the CMPA] ... by refusing and failing to comply with [the Arbitrator’s Award] as to the payment of attorney fees owed in the instant case, the amount² of which has been certain and owing from September 27, 2012”; and 2) Respondents had failed to provide documents and information in accordance with another information request AFGE had sent on September 27, 2012. (First Amended Complaint, at 1-2). In regard to the attorneys’ fees, AFGE stated that when it filed its original Complaint in August 2012, the exact amount owed in attorneys’ fees under the Award and Order was not yet known. *Id.*, at 2. AFGE alleged that it sent several emails to FEMS demanding that the amount be paid after the amount was determined on September 27, and that FEMS did not respond to any of those demands. *Id.* In regard to the information request, AFGE asserts that it requested that Respondents provide “the formula for the overtime payouts to the employees that are owed pursuant to the [Award,]” but that Respondents had failed to provide the information. *Id.* AFGE contended that these refusals and failures constituted an additional violation of the CMPA that were not addressed in its original Complaint. *Id.*, at 2-3. In addition to these new allegations, AFGE restated all of the allegations and requests that were listed in its original Complaint. *Id.*, at 3-8. Lastly, AFGE stated that if this new filing “cannot be properly considered an amendment to the earlier complaint, [then] AFGE seeks to file a new unfair labor practices complaint.” *Id.*, at 1, 3.

On January 3, 2013, Respondents moved PERB to dismiss AFGE’s proposed amended complaint. (Motion to Dismiss Amended Complaint, at 1-2). Respondents contended that the proposed amended complaint failed to allege any new allegations and “merely [recited] facts and law from the Union’s original petition.” *Id.*, at 1. Respondents further argued that PERB should dismiss the proposed amended complaint because it had been filed “absent any instruction by the PERB[,]” reasoning that because PERB’s Rules “do not provide for the submission of an Amended Complaint, one may not be filed absent instruction by the Board to cure a deficiency in the pleading.” *Id.*, at 2 (citing Letter from Ondray T. Harris, Exec. Director, PERB, to Earnest Durant, Jr., Complainant, and Kevin Stokes, Esq., Respondent’s Representative, OLRCB, PERB Case Nos. 10-U-39 and 10-E-07 (July 9, 2012) (in which then PERB Executive Director Harris stated that “[t]he Board’s Rules do not provide for the submission of an amended complaint absent instruction by the Board to cure a deficiency in the pleading”)). Respondents reasoned that because PERB had not directed AFGE to file an amended complaint and no deficiency in the original complaint had been noted, the Board must dismiss AFGE’s proposed amended complaint. *Id.*

² \$49,000. (First Amended Complaint, Exhibit A).

On January 8, 2013, AFGE filed an opposition to Respondents' motion to dismiss its proposed amended complaint and further moved PERB for a decision without a hearing on grounds that Respondents did not file a timely answer to its proposed amended complaint. (Opposition to Motion to Dismiss and Request for Decision Without a Hearing, at 1-6). AFGE stated that Respondents' contention that the proposed amended complaint failed to present any new allegations should be rejected because even Respondent's own pleading admitted that the proposed amended complaint alleged "additional details regarding the amount of attorney's fees" that were not present in the original Complaint. *Id.*, at 2 (quoting Motion to Dismiss Amended Complaint, at 1). Furthermore, AFGE argued that its original Complaint did not address the September 27 information request because such had not yet been sent when the original Complaint was filed. *Id.*, at 3.

In addition, AFGE rejected Respondents' reliance on the then Executive Director's July 9, 2012, Letter as misguided because PERB case law allows for amendments under a variety of scenarios such as a change in circumstances and other factors. *Id.*, at 3 (citing *American Federation of Government Employees, Locals 631, 872, 1972, and 2553 v. District of Columbia Department of Public Works*, 43 D.C. Reg. 1394, Slip Op. No. 306 at p. 2, PERB Case Nos. 94-U-02 and 94-U-08 (1994)). AFGE asserted that its proposed amended complaint was valid because it reflected significant changes in the parties' circumstances that had occurred since the original Complaint was filed. *Id.*

AFGE further moved PERB to issue a final decision without a hearing based on its allegation that Respondents failed to file a new response to AFGE's proposed amended complaint within fifteen (15) days as per PERB Rule 520.6.³ *Id.*, at 5-6. AFGE argued that, as a result, the allegations in the proposed amended petition should be deemed admitted and Respondents should be deemed to have waived their rights to a hearing as per PERB Rule 520.7.⁴ *Id.*, at 6.

³ PERB Rule 520.6: A respondent shall file, within fifteen (15) days from service of the complaint, an answer containing a statement of its position with respect to the allegations set forth in the complaint. The answer shall also include a statement of any affirmative defenses, including, but not limited to, allegations that the complaint fails to allege an unfair labor practice or that the Board otherwise lacks jurisdiction over the matter.

The answer shall include a specific admission or denial of each allegation or issue in the complaint or, if the respondent is without knowledge thereof, the answer shall so state and such statement shall operate as a denial. Admissions or denials may be made to all or part of an allegation but shall clearly meet the substance of the allegation.

⁴ PERB Rule 520.7: 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. The failure to answer an allegation shall be deemed an admission of that allegation.

On January 15, 2013, Respondents filed an opposition to AFGE's motion for decision arguing that the motion should be denied because the time period for Respondents to respond to AFGE's proposed amended complaint will not run until PERB rules on Respondents' motion to dismiss the proposed amended complaint. (Opposition to Motion for Decision, at 1-2) (citing Letter from Ondray T. Harris, Exec. Director, PERB, to Kevin Stokes, Esq., OLRCB, PERB Case No. 12-U-37 (November 5, 2012) (in which then PERB Executive Director Harris stated that "the limitations period prescribed in PERB Rule 520.6 does not begin to run until the Board rules on [a party's pending] Motion to Dismiss"))).

On March 4, 2013, AFGE filed another motion to amend its Complaint ("Second Motion to Amend") to "clarify that it seeks as part of the relief interest upon the backpay owed." (Second Motion to Amend, at 2). In the motion, AFGE stated:

The reason this is necessary is because, at the time the Union filed the [Complaint], the Agency was continuing to fail to pay the paramedics and emergency medical technicians according to the requirements of the Arbitrator's Award. That award required the Agency not only to compensate the employees for backpay and liquidated damages, ... but to pay them properly on a going forward basis. The reason it is significant is that the Agency was still failing to pay the employees pursuant to the Award's requirements at the time the Union filed the [Complaint] is that the employees were then continuing at that point to accumulate liquidated damages, which is in part a substitute for interest under the Fair Labor Standards Act. However, once the Agency began to pay the employees properly for [overtime hours] beginning on October 7, 2012 (the employees were paid on October 30, 2012 for that pay period), the employees no longer accumulated liquidated damages pursuant to the Award for time after that.
Id.

AFGE further contended that because FEMS still had not paid the employees' backpay under the Award and Order, "the District of Columbia and the Agency, and not these employees, have enjoyed the benefit of keeping the employees' hard-earned money and the employees will not receive any compensation for the fact that the Agency and the District of Columbia have done so, unless the PERB awards the statutory interest for all time periods after October 2012, when the employees no longer accumulated liquidated damages." *Id.* AFGE asserted that not including interest would "unfairly award the District and the Agency" and "unfairly deprive the employees from the use of their money during this period[.]" *Id.* In addition, AFGE argued that the Respondents' arguments that they needed more time to calculate what is owed under the Award and Order is "unavailing, as the District and the Agency could have simply put more resources into this matter." *Id.*, at 3.

On March 11, 2013, Respondents filed an opposition to AFGE's Second Motion to Amend. (Opposition to Second Motion to Amend, at 1-3). Respondents contended that AFGE's

motion was untimely under PERB Rule 520.4, governing the timeliness of unfair labor practice complaints.⁵ *Id.*, at 1. Respondents reasoned that, according to AFGE's own statements in its Second Motion to Amend, AFGE became aware that the employees were no longer accumulating liquidated damages on October 30, 2012. *Id.*, at 2. As such, Respondents argued that the motion was untimely when it was filed more than 120 days later on March 4, 2013. *Id.*, at 1-3 (citing *Pitt v. District of Columbia Department of Corrections, et al.*, 59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009); *Watson v. District of Columbia Housing Authority and American Federation of Government Employees, Local 2725*, 60 D.C. Reg. 58, Slip Op. No. 1342 at p. 2, PERB Case No. 12-U-32 (2012); and *American Federation of Government Employees, Local 1000 v. District of Columbia Department of Employment Services*, Slip Op. No. 1323 at p. 8, PERB case No. 10-U-54 (Aug. 27, 2012)).

Additionally, FEMS asserted that it had "substantially complied" with the Award and Order by: 1) paying all EMT's and Paramedics overtime for time worked over forty (40) hours in a work week; 2) having processed an attorneys' fee payment in the amount of \$49,000 to the Union; 3) "steadfastly and diligently" continuing to gather the data in order to calculate the amount of back overtime pay owed to affected employees; and 4) providing AFGE with status updates along the way. *Id.*, at 3. FEMS further reiterated its denial that it "refused" to comply with the Award and Order. *Id.* (citing *American Federation of Government Employees, AFL-CIO, Local 872 v. District of Columbia Water and Sewer Authority*, 54 D.C. Reg. 2967, Slip Op. No. 858, PERB Case No. 07-U-02 (2006)). As a result, Respondents asserted that even if AFGE's motion was timely, an award of interest would not be warranted in this case. *Id.*

On March 13, 2013, AFGE moved PERB to allow it to reply to Respondents' opposition to its Second Motion to Amend. (Motion to Reply, at 1-2). In this proposed Reply, AFGE argued that Respondents' timeliness argument does not avail because the purpose of its Second Motion to Amend was "only [to clarify] that which is inherent in the original petition, namely that once the amount of the debt was fully established and liquidated damages under the FLSA no longer applied, interest must be awarded under [D.C. Code §§ 28-3302 and 15-108] ... regardless of whether it [was] specifically requested." *Id.* (citing *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 D.C. Reg. 8594, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 41 D.C. Reg. 1914, Slip Op. No. 307, PERB Case No. 86-U-16 (1992)) (emphasis in original).

In addition, AFGE argued that PERB Rule 520.4 only applies to the original cause of action and Complaint, and not to "the particularities of the remedy." *Id.*, at 2. AFGE reasoned

⁵ PERB Rule 520.4: Unfair Labor Practice Complaints shall be filed not later than 120 days after the date on which the alleged violations occurred.

that even if the Rule applied, the 120 days would expire “later in March 2013 at the earliest and the Union filed this clarification amendment on March 4, 2013.” *Id.*

Lastly, AFGE denied Respondents’ claim that FEMS had “substantially complied” with the Award and Order. *Id.*, at 2-3. AFGE asserted that “of the approximately 200 employees who should receive substantial backpay and liquidated damages pursuant to the award and PERB’s Decision and Order not one single person has received any backpay whatsoever.” *Id.* AFGE further argued:

... regardless of any effort by the Agency to comply—which has been, at the very best, extremely lackluster—the fact that approximately ten and a half months have passed since the PERB Decision and Order establishes that interest should be paid. The Agency has had the benefit of these employees’ money. The employees have not had the benefit of their money. As such, interest is required by statute. *Id.*, at 3.

III. Discussion

In regard to the allegations in AFGE’s original Complaint, Respondents do not deny that FEMS must comply with the Award and Order and AFGE’s information request. (Answer, at 5-6). Rather, Respondents contend that they have not violated the CMPA because, due to the voluminous and complicated nature of the information, AFGE has not given FEMS a reasonable amount of time to fully comply with the Award and Order and the information request. *Id.* Furthermore, Respondents claim that they already provided “a large amount” of the information required by AFGE’s information request, but that the remainder of the requested information is more difficult to obtain and that more time is needed to compile and provide it to Complainant. *Id.*, at 6-7. In a later pleading, Respondents claimed that as of March 11, 2013, FEMS had “substantially complied” with the Award and Order—a claim AFGE denies. (Opposition to Second Motion to Amend, at 3); and (Motion to Reply, at 2-3).

In regard to the allegations against OLRCB, Respondents deny that OLRCB and/or its agents advised FEMS to not comply with the Award and Order in violation of the CMPA. (Complaint, at 5-6); and (Answer, at 5).

A. AFGE’s Motion to Reply

In regard to AFGE’s motion for permission to reply to Respondents’ Opposition to Second Motion to Amend, Respondents did not file anything opposing the motion. Furthermore, the Board finds that PERB’s interests are generally best served by considering all of the

information available to the parties insofar as such is filed in a timely manner and in accordance with PERB's Rules. See American Federation of Government Employees, AFL-CIO, Local 2978 v. District of Columbia Department of Health, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 10-11, PERB Case No. 09-U-23 (2013). Therefore, AFGE's motion to reply to Respondents' Opposition to Second Motion to Amend is granted and the reply attached thereto will be considered in the Board's investigation and final disposition of this matter.

B. AFGE's First Motion to Amend the Complaint and Respondents' Motion to Dismiss the Proposed First Amended

In regard to AFGE's proposed amendments to the Complaint, the Board generally allows complainants to amend a complaint as a matter of course if the proposed amendment is properly filed prior to the respondent having filed an answer to the original complaint, and by leave of the Board if the amendment is filed after the original complaint has been answered. See *National Association of Government Employees, Local R3-07 v. District of Columbia Office of Unified Communications*, Slip Op. No. 1393 at p. 1, PERB Case No. 13-U-20 (May 28, 2013); and *American Federation of Government Employees, Locals 631, 872, 1972 and 2553 v. District of Columbia Department of Public Works*, 43 D.C. Reg. 1394, Slip Op. No. 306 at p. 2-3, PERB Case Nos. 94-U-02 and 94-U-08 (1994). When leave to amend a complaint is sought, the Board will generally grant the motion if the proposed amendment: 1) "does not present a problematic issue such as an unrelated or separate and distinct matter"; 2) reflects a change in the remedy sought; 3) reflects a change in circumstances since the original complaint was filed; 4) reflects an attempt to bring the complaint into compliance with PERB's Rules; or 5) is stipulated to by the parties. *AFGE v. DPW, supra*, Slip Op. No. 306 at p. 2-3, PERB Case Nos. 94-U-02 and 94-U-08.

In the instant case, AFGE filed its proposed first amended complaint over three (3) months after Respondents filed their Answer to the original Complaint. (First Amended Complaint, at 1); and (Answer, at 1). While the pleading itself was not expressly labeled in the form of a motion, AFGE did state that "if it cannot properly be considered an amendment to the earlier complaint, [then] AGFE seeks to file [the amended version as] a new unfair labor practices complaint[.]" thus indicating that AFGE understood the Board must grant its leave to amend the Complaint before the proposed amendments can be considered in PERB's investigation. (First Amended Complaint, at 1). AFGE asserts, however, that should PERB determine that the amendment was improper and require it to be labeled as a new unfair labor practice complaint, then it (AFGE) would "simply move to consolidate [that new case] with [this case,] PERB Case # 12-U-33, as the matters involve the same parties, the same award, the same

and similar failure to comply with the awards, and related information requests.” (Opposition to Motion to Dismiss and Request for Decision Without a Hearing, at 4).

Respondents ask the Board to dismiss AFGE’s proposed first amended complaint based on their contentions that the proposed amendment fails to present any new claims and because PERB did not previously direct AFGE to file the amendment. (Motion to Dismiss Amended Complaint, at 1-2). As previously stated, AFGE’s proposed amendment does add new claims that Respondents further violated the CMPA by failing to pay the attorneys’ fees awarded in the Award and Order, and that Respondents failed to comply with another information request related to the Award and Order. (First Amended Complaint, at 1-2). Therefore, Respondents’ argument on that front does not avail. Similarly, Respondents’ contention that Complainant could not file an amended complaint absent an instruction by the Board to do so is not supported by PERB precedent, and therefore likewise fails. See *NAGE v. OUC*, *supra*, Slip Op. No. 1393 at p. 1, PERB Case No. 13-U-20; and *AFGE v. DPW*, *supra*, Slip Op. No. 306 at p. 2-3, PERB Case Nos. 94-U-02 and 94-U-08. As a result, Respondents’ motion to dismiss AFGE’s proposed first amended complaint is denied.

The Board finds that because the new claims and allegations raised in AFGE’s proposed first amended complaint involve the same parties, depend on the same nexus of facts, and arise out of the same Award and Order as those raised in the original Complaint, they do not present a problematic issue such as an unrelated or separate and distinct matter. *AFGE v. DPW*, *supra*, Slip Op. No. 306 at p. 2-3, PERB Case Nos. 94-U-02 and 94-U-08. In addition, because AFGE stated in its original Complaint that it would seek to amend the Complaint should Respondents fail to pay the attorneys’ fees awarded in the Award and Order once the amount was determined, the Board finds that the proposed amendments reflect nothing more than a change in the parties’ circumstances since the original complaint was filed. (Complaint, n.1); (Opposition to Motion to Dismiss and Request for Decision Without a Hearing, at 2-3); and *AFGE v. DPW*, *supra*, Slip Op. No. 306 at p. 2-3, PERB Case Nos. 94-U-02 and 94-U-08. Finally, the Board agrees with AFGE that PERB’s processes would not be served by bifurcating AFGE’s new allegations from those stated in its original Complaint only to have to address a motion to consolidate the two (2) cases later on down the road. (Opposition to Motion to Dismiss and Request for Decision Without a Hearing, at 4). Therefore, the Board grants AFGE leave to amend its Complaint as proposed in its First Amended Complaint.

C. AFGE’s Second Motion to Amend Complaint

In regard to AFGE’s Second Motion to Amend, in which AFGE moves PERB to allow it to amend the Complaint to request an additional remedy of interest from the time that liquidated