Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Rayshawn Douglas Complainant, v. American Federation of Government Employees, Local 2725, AFL-CIO, Respondent.	PERB Case No. 13-U-12 Opinion No. 1437 **Motion for Preliminary Relief** **Motion to Dismiss**

DECISION AND ORDER

I. Statement of the Case

Complainant Rayshawn Douglas ("Complainant" or "Douglas") filed an Unfair Labor Practice Complaint ("Complaint") against the American Federation of Government Employees, Local 2725, AFL-CIO ("Respondent" or "Union"), alleging Respondent violated D.C. Code § 1-617.04(b)(1), (2), and (3) ("Comprehensive Merit Personnel Act" or "CMPA"), because Respondent, either alone or in concert with District of Columbia Housing Authority ("DCHA"), has:

> (1) verbally reneged on its written promise to invoke arbitration on behalf of member Rayshawn Douglas, more than ten months after stating in writing to DCHA that it would invoke arbitration; (2) delayed for three additional months the selection of a Federal Mediation and Conciliation Service arbitrator, following the previous aforementioned ten-month delay in selecting an arbitrator; and (3) failed to grieve a constructive reassignment [ ] in accordance with Article 16 of the existing Local 2725-DCHA Collective Bargaining Agreement (CBA) (October 1, 2007 – September 30, 2011).

(Complaint at 1).

Complainant also moved for preliminary relief and injunctive relief. (Complaint at 18). Complainant does not state a basis for which preliminary relief should be granted. Injunctive relief is requested pursuant to *Vaca v. Sipes*, 386 U.S. 171 (1967). (Complaint at 18).

Respondent filed an Answer to Unfair Labor Practice Complaint, Opposition to Motion for Preliminary Relief, and Motion to Dismiss ("Answer"), wherein it admits it has not filed a grievance over Complainant's reassignment, nor has it sought arbitration of that issue or met with DCHA to select an arbitrator. (Answer at 6). Respondent denies that doing so violated the CMPA. (Answer at 6-7). Additionally, Respondent raised affirmative defenses that: (1) The Complaint is untimely; (2) The Complaint fails to state a claim upon which relief may be granted; (3) The duty of fair representation does not apply where the Complainant's access to available remedies is not exclusively within the control of the Union; (4) The duty of fair representation does not apply when a Complainant has made an election of remedies outside the collective bargaining context; (5) PERB is without authority to grant the relief requested; and (6) Complainant has failed to plead or establish the elements necessary for an award of preliminary relief under PERB Rule 520.15. (Answer at 7).

Respondent contended that Complainant is not entitled to preliminary relief because: (1) DCHA is not a party to this proceeding, and as such, PERB is without jurisdiction to enjoin its conduct; (2) Complainant failed to comply with the requirements for establishing a claim for preliminary relief under Board Rule 520.15; and (3) preliminary relief is not appropriate where material facts are in dispute. (Answer at 8).

Respondent further moved to dismiss the Complaint on the grounds that Complainant failed to state a case for which relief may be granted, and the duty of fair representation does not require a union to pursue every grievance to arbitration. (Answer at 9).

II. Background

Douglas has worked for DCHA for approximately sixteen (16) years. (Complaint at 2; Answer at 2). Around October 2010, an incident allegedly occurred between Douglas and a co-worker, Leslie Bilbrue, in which a warrant was issued for felony assault against Douglas. *Id.* Douglas was prosecuted for the offense, and she pled guilty to simple assault and possession of a prohibited weapon. *Id.* Douglas reached a deferred sentencing agreement with the Office of the U.S. Attorney for the District of Columbia. *Id.*

On August 4, 2011, there was another incident between Douglas and Bilbrue, in which Douglas approached Bilbrue's vehicle, which had tinted windows. (Complaint at 3; Answer at 3). Douglas claims that she was unaware that Bilbrue was present in that vehicle, and as she approached, the vehicle suddenly sped away. (Complaint at 3). Bilbrue prepared a statement, dated August 4, 2011, alleging that Douglas was screaming, banging on the window, and pointing at the windshield. (Complaint at 4; Answer at 3). A security camera captured the entire incident. *Id.*

On August 4, 2011, DCHA issued Douglas a Notice of Emergency Suspension. (Complaint at 4; Answer at 3). On August 5, 2011, DCHA police officers escorted Douglas from the premises. (Complaint at 4; Answer at 4). On September 15, 2011, DCHA issued Douglas a Notice of Suspension, for a period of fourteen (14) days, without pay, for the following causes:

Cause No. 1:	Discourteous treatment of the public, a supervisor, or other employee; to wit, use of abusive or offensive language or discourteous or disrespectful conduct toward the public or other employee.
Cause No. 2:	Other conduct during and outside duty hours that would affect adversely the employee's or the agency's ability to perform effectively; to wit, during or outside of duty hours, commission of or participation in criminal, dishonest, or other conduct of a nature that would affect or has affected adversely the employee's or his or her agency's ability to perform effectively.

(Complaint at 4-5; Answer at 4). On September 21, 2011, DCHA issued a memorandum to Douglas, wherein it confirmed her detail assignment to the Potomac Region, Stoddert Terrace property, effective August 31, 2011. (Complaint at 5; Answer at 4).

Respondent filed a Step 3 grievance, on behalf of Douglas, against DCHA on September 26, 2011. (Complaint at 6; Answer at 4).

On October 15, 2011, the Deferred Sentencing Agreement was fulfilled, as determined by the D.C. Superior Court, and Douglas' misdemeanor charges were dismissed. (Complaint at 6). Subsequently, on October 20, 2011, DCHA issued Douglas a notice indicating that her suspension had been reduced to five (5) days, to be served from October 31, 2011 to November 7, 2011. (Complaint at 7; Answer at 5).

On October 25, 2011, Respondent sent DCHA a letter to notify them of its intent to invoke arbitration. (Complaint at 7; Answer at 5). Complainant avers that in the summer of 2012, the Federal Mediation and Conciliation Service ("FMCS") advised her that an arbitrator had not been selected nor has an arbitration date been scheduled in her case. (Complaint at 8).

Complainant further avers that "on or after August 29, 2012," Respondent, having learned that Complainant retained the services of an attorney to file suit in U.S. District Court for related matters, notified Complainant that it would no longer handle her arbitration matter. (Complaint at 8). Respondent admits that Complainant filed suit in U.S. District Court, but denies the remainder of Complainant's allegation. (Answer at 5).

As of December 27, 2012, Respondent has not filed a grievance over Complainant's reassignment, nor has it sought arbitration of that issue or met with DCHA to select an arbitrator. (Complaint at 9; Answer at 6). Respondent has not provided responses to Complainant's attorney, Gerald Gilliard, regarding requests for information about any grievances. (Complainant at 9; Answer at 6-7). Gilliard has, in writing, made clear that he does not represent Complainant with regard to her grievance. (Complaint at 8; Answer at 7). It is the Respondent's

policy not to divulge information related to Union grievances to third parties, and this policy has been conveyed to Gilliard. (Answer at 7).

III. Discussion

a. Motion for Preliminary Relief

Motions for preliminary relief in unfair labor practice cases are governed by Board 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.

Am. Fed'n of State, Cnty. & Mun. Emps, Dist. Council 20, AFL-CIO, Locals 2091, 2401, 2776, 1808, 877, 709, 2092, 2087, & 1200, et. al. v. Dist. of Columbia Gov't, 59 D.C. Reg. 10782, Slip Op. No. 1292, PERB Case No. 10-U-53 (2012).

The Board's authority to grant preliminary relief is discretionary. *Id.* (citing *Am. Fed'n of State, Cnty. & Mun. Emps., Dist. Council 20, et. al. v. Dist. of Columbia Gov't, 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. Nat'l Labor Relations Bd.*, 449 F.2d 1046 (D.C. 1971). Irreparable harm does not need to be shown, but the supporting evidence must "establish that there is reasonable cause to believe that [the applicable statute] has been violated, and that remedial purposes of the law will be served by *pendent 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, et. al. v. Fraternal Order of Police/Dep't of Corrections Labor Comm., 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)).

Here, the Complainant presents no affidavits or argument in support of granting the motion for preliminary relief. Instead, the Complainant refers to *Vaca v. Sipes*, 386 U.S. 171 (1967) to assert that this Board should enjoin DCHA and Respondent. (Complaint at 18). Complainant appears to use the terms "preliminary relief" and "injunctive relief" interchangeably; the Board will apply the standard for granting preliminary relief. *See Rome Ledbetter v. Fraternal Order of Police Jerrard F. Young Lodge 1, et. al.*, 59 D.C. Reg. 10763, Slip Op. No. 1282, PERB Case Nos. 12-U-26 and 12-S-06 (2012)

While the parties agree that Respondent has not yet filed a grievance over Complainant's reassignment, nor has it sought arbitration of that issue or met with DCHA to select an arbitrator, other material facts are in dispute. (Complaint at 9; Answer at 6). The Respondent denies that it has abandoned its grievance challenging Complainant's suspension, and Respondent also denies

Complainant's assertion that it does not intend to arbitrate that grievance. (Answer at 8-9). Based on the record and these contested disputes, the Board finds that establishing the existence of the alleged unfair labor practice violations would turn on an assessment of evidence and making credibility determinations on the basis of conflicting allegations. The Board declines to do so on these pleadings alone. *See Ledbetter v. Fraternal Order of Police Jerrard F. Young Lodge 1, et. al.*, 59 D.C. Reg. 10763, Slip Op. No. 1282, PERB Case Nos. 12-U-26 and 12-S-06 (2012); *DCNA v. D.C. Health and Hospital Pub. Benefit Corps.*, 45 D.C. Reg. 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Furthermore, the Complainant does not allege facts that amount to clear-cut or flagrant violations of the CMPA, or that the effect of the alleged misconduct would be widespread, affect the public interest, interfere with the Board's processing of the Complaint or that the Board's remedial authority would be inadequate. *See* Board Rule 520.15.

Moreover, DCHA is not a party to this proceeding. Accordingly, this Board would not have authority to enjoin its conduct.

Therefore, based on the foregoing, and in accordance with Board Rule 520.15, the Board, in its discretion, denies Complainant's motion for preliminary and injunctive relief.

b. Timeliness of the Complaint

Respondent raises an affirmative defense of timeliness. (Answer at 7). Board Rule 520.4 provides: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred."

The alleged violations are that the Respondent, either alone or in concert with District of Columbia Housing Authority ("DCHA"), has:

> (1) verbally reneged on its written promise to invoke arbitration on behalf of member Rayshawn Douglas, more than ten months after stating in writing to DCHA that it would invoke arbitration; (2) delayed for three additional months the selection of a Federal Mediation and Conciliation Service arbitrator, following the previous aforementioned ten-month delay in selecting an arbitrator; and (3) failed to grieve a constructive reassignment [ ] in accordance with Article 16 of the existing Local 2725-DCHA Collective Bargaining Agreement (CBA) (October 1, 2007 – September 30, 2011).

(Complaint at 1). Board Rule 520.3(d) provides, in pertinent part: "Unfair labor practice complaints . . . shall contain [ ] [a] clear and complete statement of the facts constituting the alleged unfair labor practice, including date, time and place of occurrence of each particular act alleged[.]" The Complainant pled that "on or after August 29, 2012," Respondent, having learned that Complainant retained the services of another attorney to file suit in U.S. District Court for related matters, notified Complainant that it would no longer handle her arbitration matter. (Complaint at 8). August 29, 2012 is the last day the Complainant provided where Respondent's alleged violation(s) occurred.

The Complaint was filed on December 28, 2012, which is 121 days after the date on which the alleged violations occurred. The Board does not have jurisdiction to consider unfair labor practice complaints outside of the 120-day window. *See, e.g., Hoggard v. Dist. of Columbia Public Emp. Relations Bd.*, 655 A.2d 320, 323 (D.C. 1995) ("[T]ime limits for filing appeals with administrative adjudicative agencies . . . are mandatory and jurisdictional.").

The Board has held that the 120-day period for filing a complaint begins when the Complainant knew or should have known of the acts giving rise to the violation. *Pitt v. D.C. Dep't of Corrections, et. al.*, 59 D.C. Reg. 5554, Slip Op. No. 998, PERB Case No. 09-U-06 (2009). The Complainant pled that "on or after August 29, 2012," Respondent notified Complainant that it would no longer handle her arbitration matter. (Complaint at 8). Because Complainant did not provide any additional dates at which the alleged violation could have occurred, the Board will find that the Complainant knew or should have known that she was aware of the alleged violation on August 29, 2012. The Complaint was filed on December 28, 2012, which is 121 days after August 29, 2012. Even in the light most favorable to the Complainant, absent compelling reasons, not stated here, why August 29, 2012 should not be ruled as being the latest day at which the Complainant knew of the alleged violative conduct, the Complaint exceeds the 120-day time period mandated by Board Rule 520.4. Thus, the Complaint is untimely and beyond the Board's jurisdiction. Therefore, the Complaint must be dismissed, and the remainder of the merits of this case need not be discussed at this time.

c. Unfair Labor Practice Complaint

Complainant alleges that the Responded violated its duty of fair representation when it:

> (1) verbally reneged on its written promise to invoke arbitration on behalf of member Rayshawn Douglas, more than ten months after stating in writing to DCHA that it would invoke arbitration; (2) delayed for three additional months the selection of a Federal Mediation and Conciliation Service arbitrator, following the previous aforementioned ten-month delay in selecting an arbitrator; and (3) failed to grieve a constructive reassignment [ ] in accordance with Article 16 of the existing Local 2725-DCHA Collective Bargaining Agreement (CBA) (October 1, 2007 – September 30, 2011).

(Complaint at 1).

The duty of fair representation is breached only if "the union's conduct is arbitrary, discriminatory or in bad faith . . . or based on considerations that are irrelevant, invidious, or unfair." *See Blanche Moore v. Am. Fed'n of State, Cnty. & Mun. Emps AFL-CIO Local 1959*, 59 D.C. Reg. 7179, Slip Op. No. 1235, PERB Case No. 04-U-11 (2012); *Roberts v. Am. Fed'n of Gov't Emps. Local 2725*, 36 D.C. Reg. 1590, Slip Op. No. 203, PERB Case No. 88-S-01 (1989). The factual record does not demonstrate that the Complainant suffered "arbitrary" or "discriminatory" treatment or that the Respondent acted in "bad faith." Mere failure to respond to a request that a union bargain on a union member's behalf cannot be construed as a breach of this duty. Indeed, according to PERB precedent, even when a complainant has filed a proper grievance, mere disagreement with a union's decision not to pursue a grievance on a complainant's behalf does not constitute a breach of duty. *See Blanche Moore v. Am. Fed'n of State, Cnty. & Mun. Emps AFL-CIO Local 1959*, 59 D.C. Reg. 7179, Slip Op. No. 1235, PERB Case No. 04-U-11 (2012); *Rebecca Owens v. Am. Fed'n of State, Cnty. & Mun. Emps. Local*

2095, et. al., 52 D.C. Reg. 1645, Slip Op. No. 750, PERB Case No. 02-U-27 (2005). "The Board's precedent is clear that a disagreement with a union's judgment in handling a grievance or its decision not to pursue arbitration does not breach the duty of fair representation." *Id.*

Therefore, even if the Complaint had been timely filed, the allegations presented are not sufficient, if proven, to establish any statutory violation under the CMPA. The Complainant merely alleged that the Respondent failed to select an arbitrator or file a grievance on its behalf within an arbitrary time period selected by the Complainant. Even if the Board construed the Complainant's claims liberally to determine whether a proper cause of action has been alleged, the Complainant has presented no evidence that the Respondent violated the CMPA. Moreover, as discussed above, the Complaint was not timely filed. Since no statutory basis exists for the Board to consider the Complainant's claims, the Complaint is dismissed in entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Unfair Labor Practice Complaint and Motion for Preliminary and Injunctive Relief is dismissed.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLYOEE RELATIONS BOARD

Washington, D.C.

November 8, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-12 was transmitted via File & ServeXpress to the following parties on this 8th day of November, 2013.

Gerald Gilliard
1629 K Street, N.W., Suite 300
Wahsington, D.C. 20006

FILE & SERVEXPRESS

Brenda Zwack
O'Donnell, Schwartz & Anderson, P.C.
1300 L Street, N.W., Suite 1200
Washington, D.C. 20005

FILE & SERVEXPRESS

/s/ Joy Y. Lee

Joy Y. Lee, Esq.