

“the union rights of scores of Union members by announcing and implementing the ‘All Hands on Deck’ (AHOD) initiative without first negotiating with the [FOP].” (Compl. at p. 1). Also, on November 28, 2007, the Complainant filed a motion for preliminary relief (“Motion”), seeking that the Board order the Respondents to cease and desist from implementing the scheduled December 7 and 8, 2007 AHOD. (See Motion at pgs. 3-4).

FOP is requesting that the Board: (a) grant its request for preliminary relief; (b) find that MPD has violated the Comprehensive Merit Personnel Act (“CMPA”); (c) order MPD to cease and desist from violating the CMPA; (d) order MPD to post a notice acknowledging that it has violated the CMPA; (e) enjoin the Respondents from implementing the December 7 and 8, 2007 AHOD “until after the Board has ruled on [the] Complaint”; (f) grant its request for reasonable costs and (g) compel Respondents “to discuss the implementation of the AHOD initiative with Union leaders.” (See Motion at pgs. 2 and 4 and Compl. at p. 7).

MPD filed an opposition to the Motion (“Opposition”) and an answer to the unfair labor practice complaint denying any violation of the CMPA. MPD has requested that the Motion be denied. FOP’s Motion and MPD’s Opposition are before the Board for disposition.

II. Discussion:

In Spring 2007, Respondent Cathy L. Lanier announced and subsequently implemented a series of police-patrol deployments entitled “All Hands on Deck” (“AHOD”). Specifically, Lanier announced and implemented five AHOD deployments as follows: announced on May 15 with deployments on June 8 and 9; announced June 26 with deployments on July 27 and 28, and August 6 and 7; and announced on September 26 with deployments on November 2 and 3, and December 7 and 8, all dates were in 2007. (See Compl. at p. 3 and Attachments to Compl. Number 2, 3, 5 and 6. Also see, Respondents’ Opposition to Motion at p. 2 and Attachments to Compl. Number 1, 2 and 3).

The AHOD deployments changed the tours-of-duty for many bargaining unit employees. Specifically, FOP asserts that:

On Friday, July 27, 2007 and Saturday, July 28 2007, the Department required Union members to report to work in response to an “ All Hands on Deck” initiative. To ensure that all Union members were available, the Department canceled the days off and

(5) Refusing to bargain collectively in good faith with the exclusive representative.

changed the tours of duty for any and all police officers that were scheduled to be off on July 27 and July 28, 2007.

As a result, Union members were required to work outside of their normal tours of duty and were given non-consecutive (split) days off in violation of the [parties' collective bargaining agreement] . . . and the D.C. Code. (Compl. at p. 3).

In response to Chief Lanier's action, the FOP filed a "Step 2 Group Grievance" on August 6, 2007. In the grievance the FOP asserted that, as the result of implementation of the AHOD deployment on July 27 and July 28, 2007, the MPD violated Articles 4 and 24 of the parties' collective bargaining agreement ("CBA"), D.C. Code § 1-612.01⁴, *Hours of Work* and MPD Special Order 99-20, *Watch and Days Off Schedules*. (See Compl. at p. 3 and Attachment Number 2).

On August 14, 2007, MPD denied the Step 2 Group Grievance. (See Compl. at p. 3 and Attachment Number 3). Pursuant to the parties' CBA, FOP invoked arbitration. (See Compl. at p. 4).

⁴D.C. Code § 1-612.01 provides as follows:

- (a) A basic administrative workweek of 40 hours is established for each full-time employee and the hours of work within that workweek shall be performed within a period of not more than 6 of any 7 consecutive days . . .
- (b) Except when the Mayor determines that an organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, tours of duty shall be established to provide, with respect to each employee in an organization, that:
 - (1) Assignments to tours of duty are scheduled in advance over periods of not less than 1 week;
 - (2) The basic 40 hour workweek is scheduled on 5 days, Monday through Friday when practicable, and the 2 days outside the basic workweek are consecutive;
 - (3) The working hours in each day in the basic workweek are the same;
 - (4) The basic nonovertime workday may not exceed 8 hours;
 - (5) The occurrence of holidays may not affect the designation of the basic workweek; and
 - (6) Breaks in working hours of more than 1 hour may not be scheduled in a basic workday except under rules and regulations on flexible work schedules as provided in subsection (e) of this section.

FOP claims that the Respondents have committed an unfair labor practice violating D.C. Code § 1-617.04(a)(1) and (5) by creating and unilaterally implementing AHOD deployments which directly alter negotiated terms of the parties' CBA without first bargaining in good faith with the FOP. (See Compl. at p. 5). Also, FOP contends that the Respondents violated their duty to provide pre-implementation notice and to bargain in good faith with the FOP concerning the five AHOD deployments. (See Compl. at p. 5).

FOP asserts that MPD's violation of the CMPA is clear-cut and flagrant "because the Department and Chief Lanier have flouted and interfered with the members' scheduling rights negotiated under the Collective Bargaining Agreement. . . by purposely ignoring the D.C. Code § 1-612.01, which requires a five (5) day workweek, with two (2) consecutive days off outside of the workweek." (Motion at p. 2). Also, FOP contends that the effect of the violation is widespread, the public interest is significantly affected and the Board's ultimate remedy will be inadequate. (See Motion at p. 3). Therefore, FOP contends that preliminary relief is appropriate in this case.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part:

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 [this] 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 MPD contends that "there is no basis for preliminary relief and ask that [FOP's] Motion for Preliminary Relief be denied." (MPD's Opposition at p. 7). In support of its position, MPD asserts the following:

the "All Hands on Deck" initiative scheduled for December 7 through December 9 has already occurred, Complainant's request for preliminary relief should be denied as moot. Further, since Complainant claims that the dispute arises out of the parties' agreement and challenged the alleged violation through the parties' negotiated grievance and arbitration procedure, the Board lacks jurisdiction over the Complaint. (MPD's Opposition at p. 2).

* * *

Even if the Board determines that the request for preliminary relief is not moot, and determines that it has jurisdiction over this matter, the Respondents have not committed an unfair labor practice and preliminary relief would not be appropriate. (MPD's Opposition at p. 4).

In addition, MPD disputes the material elements of the allegations asserted in the Motion. As a result, MPD contends that preliminary relief should not be granted. (See MPD's Opposition at pgs. 4-7). Specifically, MPD asserts the following:

Contrary to Complainant's assertion, Respondents have not violated the law, the parties' CBA, or Respondents' directives by requiring employees to work outside their tour of duty and scheduling them for non-consecutive days off." (MPD's Opposition at p. 4).

* * *

Since the record indicates that Respondents acted in accordance with law and Respondents' internal scheduling directive, and Respondents complied with the parties' collective bargaining agreement, Complainant's request for preliminary relief must be denied. (MPD's Opposition at p. 6).

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 Corporations*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

In the present case, FOP's claim that MPD's 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 MPD's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. Respondents' actions presumably affect bargaining unit members. However, Respondents' 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. 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, FOP 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 FOP 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 FOP following a full hearing. In view of the above, we deny the FOP's Motion for Preliminary Relief.⁵

For the reasons discussed above, we: (1) deny FOP's request for preliminary relief and (2) direct the development of a factual record through an unfair labor practice hearing under the expedited schedule set forth in the December 14, 2007 Order.⁶

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

August 28, 2009

⁵In the present case FOP filed its motion for preliminary relief on November 28, 2007. Therefore, pursuant to Board Rule 553.2, MPD's response to the Motion was not due until December 10, 2007. As a result, the Board could not act on FOP's Motion prior to the implementation of the AHOD deployment scheduled for December 7 through December 9, 2007.

⁶This decision implements the decision reached by the Board on December 14, 2007 and ratified on July 13, 2009.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 08-U-09 was served via FAX and U.S. Mail to the following parties on this the 28th day of August, 2009. Also, attached is a copy of the Order which was originally served on December 14, 2007.

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Sheryl V. Harrington
Secretary

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**

In the Matter of:)	
)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,)	
)	PERB Case No. 08-U-09
)	
Complainant,)	Opinion No. 929
)	
v.)	Motion for Preliminary Relief
)	
District of Columbia Metropolitan Police Department,)	
)	
Respondent.)	

ORDER¹

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Metropolitan Police Department Labor Committee's Motion for Preliminary Relief is denied.
2. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.
3. A hearing shall be held in this case no later than January 15, 2008. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

¹Since this matter concerns a Motion for Preliminary Relief, the Board has decided to issue its Order now. A decision will follow.

Order Concerning Motion for Preliminary Relief

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4. Following the hearing, the designated Hearing Examiner shall submit a Report and Recommendation to the Board no later than ten (10) days following the conclusion of closing arguments or the submission of post-hearing briefs.
5. Parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.**

December 14, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Order in PERB Case No. 08-U-09 was served via Fax and U.S. Mail to the following parties on this the 14th day of December 2007:

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