

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: |) | |
| |) | |
| National Association of Government Employees, Local R3-07, |) | |
| |) | PERB Case No. 13-U-20 |
| Complainant, |) | |
| |) | Opinion No. 1393 |
| v. |) | |
| |) | Motion for Preliminary Relief |
| District of Columbia |) | |
| Office of Unified Communications, |) | |
| |) | |
| Respondent. |) | |

DECISION AND ORDER

I. Statement of the Case

Complainant National Association of Government Employees, Local R3-07 (“Complainant” or “NAGE” or “union”) filed an Amended Unfair Labor Practice Complaint (“Amended Complaint”) against the District of Columbia Office of Unified Communications (“Respondent” or “OUC” or “Agency”), alleging OUC violated D.C. Code § 1-617.04(a)(1), (2), (3) and (5) (“Comprehensive Merit Personnel Act” or “CMPA”), by “unilaterally imposing a new policy [concerning the official time of union members], for which an established past practice [existed],” in “retaliation” for another unfair labor practice complaint NAGE filed against OUC in September 2012. (Amended Complaint, at 3 and 7). Further, NAGE alleged that OUC violated its duty to bargain in good faith. *Id.*

In addition to its Amended Complaint, NAGE motioned for preliminary relief pursuant to PERB Rule 520.15, arguing that OUC’s violations of the CMPA are “clear-cut and flagrant”, “the effect of [said violations] is widespread”, “the public interest is seriously affected”, and the Board’s ultimate remedy [would] be clearly inadequate.” *Id.*, at 2. Further, NAGE contended that OUC’s “unilateral change [to] the administration of official union time will have serious,

widespread, and irreparable effect on [its] ability to represent the bargaining unit employees.” *Id.*

In its Answer, OUC admitted that it unilaterally implemented changes to the administration of official time, but denied NAGE’s allegations that doing so violated the CMPA. (Answer, at 1-15). Additionally, OUC raised affirmative defenses that: 1) NAGE’s Amended Complaint was not filed within the 120-day window required by PERB Rule 520.4; 2) NAGE’s allegations are based on contractual violations over which PERB lacks jurisdiction to adjudicate; 3) PERB should defer the adjudication of NAGE’s allegations to the parties’ negotiated grievance and arbitration procedures; 4) the parties’ Collective Bargaining Agreement (“CBA”) does not require OUC to bargain over the allocation of official time; 5) the very acts NAGE alleged as violations of the CMPA are allowed by the CBA; and 6) NAGE did not request to bargain the impacts and effects of OUC’s changes to the allocation of official time after OUC provided NAGE with notice of the changes. *Id.*, at 9-15.

In addition, OUC contended that NAGE is not entitled to preliminary relief because NAGE’s request “was not accompanied by [any supporting] affidavits or evidence.” *Id.*, at 9. OUC asserted that rather, NAGE’s Amended Complaint “simply set forth legal conclusions.” *Id.* Additionally, OUC argued that: 1) the wrongdoing alleged in the Amended Complaint is neither “clear-cut nor flagrant” because OUC’s actions “[comply] entirely with the CBA”; 2) “the effect of the alleged wrongdoing affects only a limited number of bargaining unit employees” and is therefore “not widespread”; 3) “for this reason, the public interest is not seriously affected by the alleged wrongdoing”; and 4) NAGE failed “to show any example of interference with PERB’s processes.” *Id.*

II. Background

NAGE alleges that on or about September 28, 2012, it filed an unfair labor practice Complaint¹ against OUC for “assisting another Union in a petition for exclusive recognition.” (Amended Complaint, at 3). NAGE alleges that since then, OUC “has engaged in a course of retaliatory actions, including making many casual references to the local President about changing the administration of the local’s official time.” *Id.* OUC denies this allegation. (Answer, at 2).

NAGE alleges that on or about September 30, 2012, the CBA expired and “the parties began negotiating a successor agreement on working conditions, and executed Ground Rules for the negotiation” which became effective on September 26, 2012. (Amended Complaint, at 3).

¹ PERB Case No. 12-U-37.

OUC contends the CBA actually expired in 2010, but was “rolled over” for two (2) years in accordance with Article 28(D) of the CBA. (Answer, at 2).

The parties agree that the Ground Rules state the current CBA will remain “in full force and effect” until the new agreement is executed and ratified. (Amended Complaint, at 3 and Exhibit 2); and (Answer, at 2). Furthermore, the parties agree that the CBA does not specify the number of hours union officials can dedicate to union purposes. (Amended Complaint, at 3); and (Answer, at 2). NAGE contends that since 2006, “the number of allotted official hours was determined through practice and informal agreements.” (Amended Complaint, at 2, and Exhibit 4). OUC denies that the number of hours was “agreed upon” by the parties and instead claims that the number of allotted hours was “determined by the [OUC] director, pursuant to her exercise of a management right.” (Answer, at 3-4) (citing Amended Complaint, Exhibit 6). Either way, the parties agree that the guidelines each relied on for official time were: a) “[t]hirty-five hours per week would be applicable for use by [all of the] Union shop stewards and officials”; and b) “[t]he local president would be entitled to an additional and separate allotment of 50% official time.” (Amended Complaint, at 3); and (Answer, at 3-4).

NAGE claims that since 2010, the local president “allocates 20 of the 35 generally applicable hours towards [sic] herself” and that, as a result “of the 50% time and the additional 20 hours, [the local president] is awarded 100% official union time.” (Amended Complaint, at 3-4). NAGE further claims the “remaining fifteen [15] hours are distributed, based on need and availability, to the remaining Union shop stewards and officials.” *Id.* NAGE states that these agreements and practices constituted an accepted past practice that OUC was obligated to continue honoring until a new CBA was agreed upon and executed. *Id.*, at 4-6. OUC denies all of these assertions. (Answer, at 4-6).

NAGE further alleges that on October 16, 2012, an OUC official told NAGE’s local president that OUC intended to change the ways official time was administrated and failed to provide “official notice” of the change. (Amended Complaint, at 4). OUC denied that it failed to notify NAGE of its intent to make the change and argued that the OUC official’s conversation with the local president constituted its official notice to NAGE of its intentions. (Answer, at 4).

NAGE contends that on December 17, 2012, OUC’s director told the local president she intended to reduce the amount of official time allotted to the “entire local” (Amended Complaint, at 4). NAGE further asserts that on February 20, 2013, NAGE “gave damaging testimony directly contesting statements submitted by [OUC’s director] in preparation for her testimony to the D.C. Council.” *Id.*, at 5. NAGE alleges that shortly thereafter, on March 4, 2013, OUC’s director notified the local’s president that, effective March 10, 2013, the administration of official time would be modified as follows:

- a. Official time will only be granted after an employee reports to roll call/work.
- b. Official time may not be requested during periods of premium pay or during a declared emergency.
- c. Scheduling considerations may not allow for the immediate release of an employee from their assignment. Permission for release will be at the supervisor's discretion; however, permission for release will not be unreasonably delayed.
- d. The Official Time Form will be used in recording employee requests and documenting employee absences.
- e. Accommodations will be made for authorized employees to attend the following standing meetings.
 - i. Contract Negotiations;
 - ii. Mayor LMPC;
 - iii. Comp and Class Meetings. *Id.*²

NAGE avers it sent several correspondences to OUC arguing that, in accordance with the parties' past practices, and pursuant to the Ground Rules, OUC was required to maintain the status quo with regard to official time until a new CBA on working conditions was executed. *Id.*, at 6. NAGE claims OUC responded to these correspondences by offering to meet with NAGE to discuss the changes, but NAGE responded stating it was not requesting to bargain because "bargaining over this issue had already commenced as part of the negotiations over the successor agreement..." *Id.* NAGE claims OUC responded stating that OUC understood NAGE's reply to be a withdrawal of its request to bargain. *Id.*

Additionally, NAGE alleges that approximately half of its officials and stewards are assigned to two (2) of the three (3) daily shifts that earn "premium pay" and are therefore ineligible to claim any official time under the modifications. *Id.*, at 5-7. As a result, NAGE alleges that approximately two-thirds of bargaining unit employees "will be deprived of union representation during their shifts." *Id.*, at 7. Furthermore, NAGE alleges that OUC's unilateral changes will "severely [restrict the Union officials'] ability to attend all meetings, timely prepare grievances, and fulfill all of their representational duties." *Id.*, at 6.

NAGE concluded that: 1) OUC's "silence in response to the Union's assertion that the parties are already engaged in bargaining over changes to this practice is a violation of its duty [to bargain in good faith]"; and 2) OUC's actions are "a flagrant attempt to restrain the Union's

² OUC distributed a memorandum to all OUC employees outlining these modifications on March 7, 2013. (Amended Complaint, at 6 and Exhibit 10); and (Answer at 7).

ability to represent its membership” and are therefore “in direct violation of [D.C. Code § 1-617.04(a)(1), (2), (3) and (5)]”. *Id.*, at 7.

In its Answer, OUC admits it instituted the changes as alleged, but denies that doing so violated the CMPA. (Answer, at 5-9). OUC avers that making the changes was a legal exercise of its management rights. *Id.*, at 5-7. Further, OUC contends its several meetings and discussions with NAGE, wherein it notified NAGE’s president of its intentions to make the changes, sufficiently satisfied the notice requirements under those rights. *Id.*, at 6. OUC admits NAGE never requested to engage in impact and effects bargaining over the changes. *Id.*, at 7.

OUC denies NAGE’s contention that a past practice governing official time had been established between the parties. *Id.* OUC further denies the changes will restrict the union officials’ abilities to attend meetings, prepare grievances, and fulfill their representational duties. *Id.*, at 8. OUC denies the allegation that half of the union’s officials and stewards work “premium pay shifts” as well as the allegation that two-thirds of bargaining unit employees will be deprived of union representation during their shifts. *Id.*

Last, OUC denies that it failed to respond to NAGE’s claims that bargaining had already commenced. *Id.*, at 8-9. In support of its denial, OUC points to Exhibit 14 in the Amended Complaint, in which an OUC representative expressly stated that NAGE “[was] correct that official time is included in the current negotiations between NAGE and OUC,” but asserted the issue “[had] yet to be discussed.” *Id.* (citing Amended Complaint, Exhibit 14). As such, OUC denies NAGE’s allegations that OUC violated its duty to bargain in good faith and that OUC’s actions constituted “a flagrant attempt to restrain the Union’s ability to represent its membership ... [in violation] of [D.C. Code § 1-617.04(a)(1), (2), (3) and (5)].”

In addition to its admissions and denials of NAGE’s allegations, OUC raised several affirmative defenses.

OUC alleges that NAGE’s Amended Complaint was not filed within the 120-day window required by PERB Rule 520.4. *Id.*, at 9-10. OUC avers that unfair labor practice complaints must be filed within 120 days of the date that the Complainant “knew or should have known of the acts giving rise to the violation.” *Id.* (quoting *American Federation of Government Employees, Local 631 v. District of Columbia Department of Public Works*, 59 D.C. Reg. 10755, Slip Op. No. 1279 at p. 2, PERB Case No. 06-U-39 (2012)). OUC contends NAGE knew or should have known about the alleged violations on October 20, 2012, which required its Complaint to be filed no later than February 17, 2013 (or the next business day). *Id.*

Next, OUC argued NAGE’s allegations are based on contractual violations over which PERB lacks jurisdiction to adjudicate. *Id.*, at 10-11. OUC argued PERB “has previously treated Ground Rules as contractual provisions” and has also held that “where the parties have agreed to

allow their negotiated agreement to establish the obligations that govern the very acts and conduct alleged in the complaint as statutory violations of the CMPA, the Board lacks jurisdiction over the Complaint allegation.” *Id.* (quoting *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 60 D.C. Reg. 7366, Slip Op. No. 1101 at p. 6, PERB Case No. 08-U-41(a) (2011)). OUC argued the “gravamen” of NAGE’s Complaint is that OUC violated the parties’ Ground Rules by failing to honor a past practice, which had become an implied term of the parties’ CBA. *Id.*, at 11. Therefore, OUC reasoned “PERB case law holds that PERB lacks jurisdiction over the instant matter.” *Id.*

OUC averred that since this matter is based on a contractual question, PERB should defer the adjudication of NAGE’s allegations to the parties’ negotiated grievance and arbitration procedures. *Id.* (citing *American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2921, AFL-CIO v. District of Columbia Public Schools*, 42 D.C. Reg. 5685, Slip Op. No. 339, PERB Case No. 92-U-08 (1992) (holding that if an interpretation of a contractual obligation is necessary and appropriate to a determination of whether a non-contractual statutory violation has been committed, the Board will defer the matter to the parties’ grievance and arbitration procedures). OUC contends that because an interpretation of Article 16 is necessary to determine if there has been a statutory violation of the union members’ “official time,” PERB must defer the matter to the parties’ grievance and arbitration procedures. *Id.*

OUC next averred that the parties’ CBA does not require OUC to bargain over the allocation of official time. *Id.*, at 12. OUC argued PERB has held that an employer does not violate the CMPA where a unilateral change does not involve a mandatory subject of bargaining. *Id.* (citing *University of the District of Columbia Faculty Association v. University of the District of Columbia*, 43 D.C. Reg. 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1996)). Further, OUC noted that Section E of Article 28 in the parties’ CBA states that “[a]ll terms and conditions of employment not covered by the terms of this Agreement shall continue to be subject to the Employer’s direction and control...” *Id.* Therefore, based on NAGE’s own assertion in the Amended Complaint that the CBA “does not specify the number of hours to be used for [official time], or the allocation of those hours between local officials”, OUC contended the administration of official time is a management right under OUC’s direction and control. *Id.* (quoting Amended Complaint, at 3). Additionally, OUC reasoned that because NAGE admitted it declined to request impact and effects bargaining over OUC’s directive, then “PERB jurisprudence” dictates that OUC’s unilateral changes to the administration of the allocation of official time cannot be considered violations of the CMPA even when viewing the facts in the light most favorable to NAGE. *Id.*

Additionally, OUC argued that the very acts NAGE alleged as violations of the CMPA were allowed by the CBA. *Id.*, at 12-13. Applying its reasoning that Section E in Article 28

establishes the administration of official time as a management right, OUC contended the CBA empowered it to engage in the “very acts” that NAGE now alleges were statutory violations. *Id.* at 13-14 (citing *FOP v. MPD, supra*, Slip Op. No. 1101 at p. 6, PERB Case No. 08-U-41(a)). As such, OUC argued PERB does not have jurisdiction to adjudicate said allegations and should defer this matter to the parties’ grievance and arbitration procedures. *Id.*

Further, OUC argued that because NAGE did not request to bargain the impacts and effects of OUC’s changes to the allocation of official time after OUC notified NAGE of its intentions to make the changes, and because Section E in Article 28 establishes the administration of official time as a management right, OUC could not have committed any violation of the CBA or the CMPA. *Id.*, at 14-15 (citing Amended Complaint, Exhibits 8, 11, and 15).

Finally, in response to NAGE’s Motion for Preliminary relief, OUC argued that NAGE is not entitled to preliminary relief because NAGE’s request “was not accompanied by [any supporting] affidavits or evidence”. *Id.*, at 9. Additionally, OUC argued that: 1) the wrongdoing alleged in the Amended Complaint is neither “clear-cut nor flagrant” because OUC has demonstrated that its actions “[comply] entirely with the CBA”; 2) “the effect of the alleged wrongdoing affects only a limited number of bargaining unit employees” and is therefore “not widespread”; 3) “the public interest is not seriously affected by the alleged wrongdoing”; and 4) NAGE failed “to show any example of interference with PERB processes.” *Id.*

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.* (see also *AFSCME D.C. Council 20, et al., v. D.C. Gov't, et al., supra*, Slip Op. No. 330 at p. 4, PERB Case No. 92-U-24). In *Automobile Workers, supra*, the 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 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)).

Here, the Board finds that NAGE failed to meet the requirements of Board Rule 520.15. While the parties agree that OUC unilaterally changed the administration of official time, several other material disputes of fact remain contested. For instance, the parties disagree about: whether a past practice had been established that OUC was required to honor; whether the power to unilaterally change the official time provisions was a protected management right under the parties' CBA; and the number of NAGE members that will be affected by OUC's restriction on official time being claimed during periods of "premium pay." Based on these contested disputes and others, the Board finds that there is not enough evidence at this stage to determine that OUC's conduct was "clearly and flagrantly" in violation of the statute, as required by Board Rule 520.15. *Id.*

Furthermore, because the number of bargaining unit members who will be affected by OUC's changes to the administration of official time is a materially disputed fact, the Board cannot find that the effect of OUC's alleged wrongdoing is "widespread." *Id.* Similarly, the Board cannot find that the public interest has been seriously affected, or that OUC's actions have interfered with the Board's processes. *Id.* Lastly, the Board finds that NAGE failed to provide enough evidence to demonstrate that its allegations, if true, are such that the remedial purposes of the law would be best served by *pendente lite* relief. *Id.*

Therefore, based on the forgoing, and in accordance with PERB Rule 520.15, the Board, in its discretion, denies NAGE's motion for preliminary relief. *Id.*

Furthermore, in accordance with the Board's finding that the parties' pleadings present numerous material disputes of fact, and 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. *Id.* (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)).

ORDER

IT IS HEREBY ORDERED THAT:

1. The National Association of Government Employees, Local R3-07's request for preliminary relief is denied.
2. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and present 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

May 28, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-20, Slip Op. No. 1393, was transmitted via File & ServeXpress and e-mail to the following parties on this the 4th day of June, 2013.

Julianne Bongiorno Bythrow
National Association of Government Employees
901 North Pitt Street
Suite 100
Alexandria, VA 22314
Jbongiorno@nage.org

File & Serve and E-MAIL

Kevin M. Stokes
Michael D. Levy
Natasha N. Campbell
D.C. Office of Labor Relations and Collective Bargaining
441 4th St, N.W.
Suite 820 North
Washington, DC 20001
Kevin.Stokes@dc.gov
Michael.Levy@dc.gov
Natasha.Campbell@dc.gov

File & Serve and E-MAIL



Colby J. Harmon, Esq.
Attorney-Advisor