Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, AFL-CIO Local 2978,	
Complainant,	PERB Case No. 09-U-23
	Opinion No. 1356
v.	
District of Columbia Department of Health,	Motion to Dismiss Motion for Decision on the Pleadings
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, AFL-CIO Local 2978 ("Complainant" or "AFGE" or "union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Department of Health ("Respondent" or "DOH" or "Agency"), alleging DOH violated the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.04(a)(1) and (5), when it "failed and refused to respond to [a Union] information request." (Complaint at 2). Further, AFGE alleged that DOH "failed and refused to bargain in good faith." *Id.*

In its Answer, DOH denied the union's allegations. (Answer at 1-4). In addition, DOH raised an affirmative defense that the "Complainant [failed] to allege any conduct that constitutes an unfair labor practice under § 1-617.04 of the D.C. Official Code (2001 ed.)[,]" and moved for the Public Employee Relations Board ("PERB" or "Board") to dismiss the Complaint "with prejudice." (Answer at 4).

AFGE later filed a Motion for Decision On the Pleadings ("Motion for Decision"), in which it argued: the dispositive facts in the matter were undisputed; "Board precedent clearly establishes that an agency has an obligation to provide information in response to a request made by a union[;]" and "DOH's anticipated defense that it did not need to respond because the Union did not ask quite the correct questions is unavailing." (Motion for Decision at 2-5).

DOH filed a Response to Complainant's Motion for Decision On the Pleadings ("Response to Motion for Decision"), in which DOH stated that it "does not oppose Complainant's [Motion for Decision]." (Response to Motion for Decision at 1). In addition, DOH requested that the PERB "allow the parties to brief and/or give oral argument on the remaining legal issues as allowed within PERB Rule 520.10." *Id.* Furthermore, DOH requested "that the parties stipulate to the facts as they are stated in the pleadings, and stipulate to the authenticity of the documents attached to the pleadings." *Id.* Lastly, DOH requested that the "record be amended to include an affidavit from Mr. Dennis Jackson [("Mr. Jackson)], a representative of the Agency and attorney with the Office of Labor Relations and Collective Bargaining, concerning his conversation with Mr. Robert Mayfield [("Mr. Mayfield")], President of the Union, on or around January 22, 2009." *Id.* at 2. The Affidavit was submitted as an attachment to DOH's Response to Motion for Decision.

AFGE then filed a Reply to Respondent's Response to Motion for Decision On the Pleadings ("Reply to Respondent's Response to Motion for Decision"), arguing that it did not believe that DOH's request for additional briefing on the remaining legal issues was "justified or necessary" because it (AFGE) was not aware of any legal issues, "presumably raised in the complaint and answer...[,] that cannot be decided on the basis of those pleadings." (Reply to Response to Motion for Decision at 1-2). Furthermore, AFGE argued that DOH did not identify any such issues. *Id.* at 2. AFGE disputed DOH's request to amend the record to include Mr. Jackson's Affidavit on the basis that the case would no longer be "one where [the] decision is being made on the pleadings." *Id.* Moreover, AFGE contended that it would be likewise unnecessary to grant DOH's requests that the parties stipulate to the facts as well as stipulate to the authenticity of the documents attached to the pleadings because "DOH has not disputed any of the Union's facts or identified any dispute over the authenticity of the documents." *Id.* at 1. AFGE then renewed "its request that the PERB decide whether DOH violated the CMPA based on the pleadings already in the record." *Id.* at 2. Notwithstanding, AFGE argued that if the PERB did allow DOH's affidavit to enter the record, it (AFGE) should be given an opportunity to "file a substantive opposition to DOH's response" or that a hearing be set in the matter "promptly". *Id.*

DOH filed a Reply to Complainant's Reply to Respondent's Response to Complainant's Motion for Decision on the Pleadings ("Reply to Reply to Response to Motion for Decision"), stating that it would withdraw Mr. Jackson's Affidavit if AFGE would "stipulate to the time,

place and content of the conversation between [Mr. Jackson] and [Mr. Mayfield]" on the grounds that the details of the conversation were "included in Respondent's Answer." (Reply to Reply to Response to Motion for Decision at 1). Furthermore, DOH averred that "the legal issue of whether Respondent is obligated to provide Complainant with requested information that clearly, according to the undisputed facts, does not exist[,] still remains." *Id.* As a result, DOH renewed its request that the PERB "allow the parties to brief and/or give oral argument on this remaining legal issue." *Id.* at 1-2. Lastly, DOH offered that "[i]f the issue regarding the conversation between Mr. Jackson and Mr. Mayfield is resolved, [the Agency] agrees with Complainant that a fact finding hearing would be unnecessary." *Id.* at 2.

II. Background

On January 6, 2009, Robert Mayfield ("Mr. Mayfield") of AFGE sent a letter to DOH Director, Dr. Pierre N.D. Vigilance, MD, MPH ("Dr. Vigilance"), requesting information from DOH about the "[imminent]... contracting out" of the services provided by the Community Supplemental Food Program ("CSFP"). (Complaint at 2, and Motion for Decision at Exhibit #1). The January 6 letter requested information about the "closure of the CFSP ... and/or a Reduction-In-Force [("RIF")] among the bargaining unit employees working in the CFSP." The letter, which was included as an exhibit with AFGE's Motion for Decision, shows that AFGE specifically requested that DOH provide AFGE: any and all documents justifying the contracting out of CSFP services; copies of all current DOH contracts for services formerly or currently provided by DOH employees; access to the "Official Contract Files ([per] D.C. Code § 2-301.05b(a))"; copies of "all notices of [DOH's] contracting out of the CSFP provided to the Union in accordance with Articles 42, 47, and 48 of the labor agreement"; citations and copies of any and all legal authority "dealing with contracting out services formerly or currently provided by DOH employees"; copies of "the estimate of the fully allocated cost associated with providing the relevant services using District government employees that is part of the official contract file for contracting out the CSFP in accordance with [D.C. Code § 2-301.05b(a)]"; information on how to bid on the contract for the services provided by the CSFP "in accordance with D.C. Code § 2-301.05b(b)]"; a detailed explanation of DOH's plan to comply with D.C. Code § 2-301.05b(c) along with any supporting documents; a description of the impact that contracting out the CSFP would have on each District government employee who works "in any amount or respect on the CSFP"; a description of DOH's plan to comply with D.C. Code § 2-301.05b(d); a detailed explanation of DOH's plan to comply with D.C. Code § 2-301.05b(e) along with any supporting documents; and a list of "any applicants who applied and will be considered for receiving an award in accordance with [a 2008 DOH request for applications] along with certain specific information of each candidate. (Motion for Decision at Exhibit #1). In the letter, Mr.

Mayfield stated that time was of the essence and requested that DOH respond to AFGE's request by no later than January 16, 2009. *Id.*

DOH, in its Answer, admitted that it received the January 6 letter requesting information about the CSFP. (Answer at 2). However, it denied that the letter requested any information about a [RIF] of bargaining unit employees in the CSFP or about the closure of the CSFP. *Id.* The letter itself confirms that AFGE indeed did not request any information related to a RIF of CSFP employees or the closure of the CSFP. (Motion for Decision at Exhibit #1). In its Answer, DOH averred that the letter "[limited] its request for information ... only [to] the possible contracting out of the CSFP." (Answer at 2).

AFGE alleged that on or about January 14 and again on or about January 21, 2009, Mr. Mayfield sent emails to DOH Attorney-Advisor, Dennis Jackson ("Mr. Jackson"), asking when DOH would respond to its information request. (Complaint at 2). As of February 23, 2009, the date of the filing of the Complaint, AFGE alleged that DOH had not responded to either email. *Id.* In its Answer, DOH admitted that it received the emails, but denied that it never responded to them. (Answer at 2). DOH argued that Mr. Jackson spoke verbally with Mr. Mayfield on or about January 22, 2009, and informed him that DOH "was still working on the Union's information request." *Id.* In its Response to Motion for Decision, DOH provided an affidavit signed by Mr. Jackson which provided additional details about what was conveyed by Mr. Jackson to Mr. Mayfield on that date. (Response to Motion for Decision at 3). In the affidavit, Mr. Jackson claimed he told Mr. Mayfield that DOH "was still working on the request and would not be able to respond until it was determined if the [CSFP's services] were being contracted out pursuant to the Procurement Practices Act [("PPA")] [codified in D.C. Code § 2-301.05], which the Union cites to throughout [its] request." *Id.* In addition, Mr. Jackson further claimed he told Mr. Mayfield on that date that "if it was found the services of CSFP were not contracted out[,] there would be no information to provide since the entire information request concerned the contracting out of CSFP services." *Id.*

In its Reply to Response to Motion for Decision, AFGE did not admit or deny that this conversation took place, but argued that the PERB should not consider Mr. Jackson's affidavit in the event that it grants AFGE's motion to decide this matter on the pleadings because it was not included with DOH's original pleading (i.e. Answer). (Reply to Response to Motion for Decision at 2).

In the Complaint, AFGE alleged that on or about January 30, 2009, "all of the bargaining unit employees working on the CSFP were terminated from their positions with DOH." (Complaint at 2). DOH admitted that on January 30, 2009, "pursuant to a [RIF] order signed by the Mayor on December 29, 2008, all employees in the [CSFP], including non-bargaining unit positions, were removed from their positions with the Agency." (Answer at 3).

In the Complaint, AFGE contended that as of February 23, 2009, the date of the Complaint, DOH had "failed and refused to produce any of the information requested by the Union in its [January 6] information request." (Complaint at 2). In its Answer, Respondent denied this allegation and contended that it had "been found that the services of the CSFP [had] not been contracted out such that the actions of the Agency fall within the guidelines of the [PPA]." (Answer at 3). DOH further contended in its Answer that, as a result of its finding that the services had not been contracted out, "the information requested by the Union cannot be provided because it does not exist." *Id.* In its Motion for Decision, AFGE argued that "[a]t a minimum, if information exists that abrogates DOH's obligation to respond substantively to the Union's request, i.e. information supporting the DOH's position that the CSFP was not contracted out, that itself is responsive information that should be produced in order for the Union to understand and investigate its rights to proceed in the grievance procedure, negotiations, or elsewhere." (Motion for Decision at 6). AFGE further contended that "the Union's broad request [required] that DOH produce a substantive response, even if the District's privatization law does not apply." *Id.*

In the Complaint, AFGE contended that as of February 23, 2009, the date of the complaint, the DOH had not responded to its information request and therefore "failed to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5)." (Complaint at 2). In its Answer, DOH denied this allegation and stated that "at no time [had] it refused or received a request by the Union to bargain in good faith in accordance with [the provisions of the CMPA quoted by AFGE]." (Answer at 3). In its Motion for Decision, AFGE noted that "DOH's failure and refusal to produce any of the requested information [had] made it extremely difficult for the Union to investigate any grievances or competently consult and negotiate with DOH over the closure of the CSFP and the RIF of bargaining unit employees." (Motion for Decision at 4).

III. Discussion

A. Motion to Dismiss

In its Answer, DOH raised the affirmative defense that the "Complainant [failed] to allege any conduct that constitutes an unfair labor practice under § 1-617.04 of the D.C. Official Code (2001 ed.)[,]" and moved for the PERB to dismiss Complaint "with prejudice." (Answer at 4).

A Complainant does not need to prove its case on the pleadings, but it must plead or assert allegations that, if proven, would establish a statutory violation. See *Virginia Dade v. National Association of Government Employees, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No.

491 at p. 4, PERB Case No. 96-U-22 (1996); *Gregory Miller v. American Federation of Government Employees Local 631 v. District of Columbia Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); and *Goodine v. Fraternal Order of Police/District of Columbia Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

In addition, agencies are obligated to provide documents in response to a request made by the union. *American Federation of Government Employees, Local 631 v. District of Columbia Water and Sewer Authority*, 59 D. C. Reg. 3948, Slip Op. No. 924 at p. 5-6, PERB Case No. 08-U-04 (2007) (citing *Teamsters, Local 639 and 730 v. District of Columbia Public Schools*, 37 D.C. Reg. 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and *Psychologists Union, Local 3758 of the District of Columbia Department of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health*, 54 D.C. Reg. 2644, Slip Op. No. 809, PERB Case No. 05-U-41 (2005). Moreover, the United States Supreme Court has held that an employer's duty to disclose information "unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement." *National Labor Review Board v. Acme Industrial Co.*, 385 U.S. 32, 36 (1967).

Furthermore, when an agency has failed and refused, without a viable defense, to produce information that the union has requested, the agency resultantly fails to meet its statutory duty to bargain in good faith and has therefore violated D.C. Code § 1-617.04(a)(5). *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65 (2009) (citing *Psychologists Union, Local 3758 of the D.C. Dep't of Health, 1199 National Union of Hospital and Health Care Employees, American Federation of State County and Municipal Employees, AFL-CIO v. District of Columbia Department of Mental Health, supra*, Slip Op. No. 809, PERB Case No. 05-U-41). In addition, "a violation of the employer's statutory duty to bargain [under D.C. Code §1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with the employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing" found in D.C. Code §1-617.04(a)(1). *Id.* (quoting *American Federation of State, County and Municipal Employees, Local 2776 v. District of Columbia Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990)).

In this case, the only argument DOH provided to support its affirmative defense and motion to dismiss was that "Complainant [failed, in the Complaint,] to allege any conduct that

constitutes an unfair labor practice under [the CMPA]." AFGE has provided more than enough alleged facts, reasoning, and authority in its Complaint to establish that DOH's failure and refusal to provide the information AFGE requested, should such be proven, would constitute an unfair labor practice in violations of D.C. Code § 1-617.04(a)(1) and (5). Respondent's motion to dismiss AFGE's Complaint is therefore denied.

B. Motion for Decision on the Pleadings

PERB Rule 520.8 states: "[t]he Board or its designated representative shall investigate each complaint." Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." The Rule further states that "[t]he parties shall submit to the Board or its designated representative evidence relevant to the complaint", and that such evidence "may include affidavits or other documents, and any other material matter." Pursuant to these rules, all documents and evidence properly and timely filed with the PERB can be considered by the Board in its investigation and, if the Board finds, pursuant to its investigation, that there "is no issue of fact to warrant a hearing", that same evidence can be considered by the Board in its final decision. However, Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties" (emphasis added).

In its Answer, DOH generally denied the legal conclusions alleged by AFGE in its Complaint, but did not dispute the underlying facts alleged by AFGE in the Complaint. (Answer 2-4). It its Motion for Decision, AFGE detailed its understanding of the "undisputed facts" in this matter. (Motion for Decision at 2-4). In its Response to AFGE's Motion, the DOH stated that it "[did] not oppose Complainant's [Motion for Decision] pursuant to PERB Rule 520.10." (Response to Motion for Decision at 1). Furthermore, in that Response, DOH requested only that the parties "stipulate to the facts as they are stated in the pleadings" and that the Board "allow the parties to brief and/or give oral argument[s] on the remaining legal issues as allowed within PERB Rule 520.10." *Id.* Hence, based upon DOH's statement that it did not oppose AFGE's Motion for Decision, which contained its characterization of the "undisputed facts," and based upon DOH's request that the parties "stipulate to the facts as they are stated in the pleadings [(including, the Board presumes, AFGE's Motion for Decision),]" and based upon DOH's contention that the only contested matter in the case was a single legal question, the Board finds that the undisputed facts in this matter are these: 1) AFGE's January 6 letter properly requested information from DOH regarding its imminent plans for the CSFP; 2) on that date, DOH had in its possession the RIF order signed by the Mayor on December 28, 2008; 3)

AFGE duly followed up on its information request three (3) times when Mr. Mayfield sent emails to Mr. Jackson on January 14 and 21, 2009, and when Mr. Mayfield verbally asked Mr. Jackson about the status of the request on or about January 22, 2009; 4) CSFP's employees were RIF'd on or about January 30, 2009; 5) by February 23, 2009, the date of AFGE's Complaint, DOH still had not responded to AFGE's request in any way other than to verbally request more time to comply with DOH's information request, with which it never followed through; and 6) by March 16, 2009, the date of DOH's Answer, DOH had "found" by its own analysis that the January 30 RIF was not a "contracting out" of the services provided by the CSFP. Therefore, because all of these facts are undisputed by the parties, the PERB can properly decide this matter based upon the pleadings in the record pursuant to Rule 520.10.

Before moving to its final analysis of this matter, the Board will address the sub-issues presented by the parties in their various pleadings.

1. Request for Additional Briefing on Remaining Legal Issue

The DOH requested that the Board allow additional briefing on the legal question of whether information must be provided to the union if it is found or determined that the requested information "does not exist." (Response to Motion for Decision at 1, and Reply to Reply to Response to Motion for Decision at 1). The Board finds that a discussion on this question is not necessary here because, by DOH's own admission, the requested information *did* exist. AFGE, in its January 6, 2009, letter to the DOH, requested that the DOH disclose and provide to AFGE all of the pertinent information related to the DOH's plans and intentions concerning the contracting out of the CSFP along with any supporting legal documentation, contracts, etc. it had in support of those plans. (Motion for Decision at Exhibit #1). On the date that the request was made, DOH already had in its possession the RIF order that was signed by the Mayor on December 28, 2008. (Answer at 3). Furthermore, even if the DOH narrowly construed AFGE's information request to only require the disclosure of documents that specifically addressed the "contracting out" of the CSFP, then the DOH's admitted "finding" that "the services of the CSFP [had] not been contracted out such that the actions of the Agency fall within the guidelines of the [PPA]" certainly fits that description. (Answer at 3).

The National Labor Relations Board ("NLRB") has articulated that even when a Union's request for information is ambiguous or when it requests information that is not required by the bargaining agreement, such does not excuse an agency's blanket refusal to respond to the request. *Azabu USA (Kona) Co., Ltd. et al*, 298 N.L.R.B. 702 (1990) (citing *A-Plus Roofing*, 295 N.L.R.B. 967, JD fn. 7 (July 11, 1989); *Barnard Engineering Co.*, 282 N.L.R.B. 617, 621

(1987); and *Colgate-Palmolive Co.*, 261 N.L.R.B. 90, 92 fn. 12 (1982). Indeed, "an employer may not simply refuse to comply with an ambiguous and/or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Id.* Thus, the Board finds that it is likewise reasonable to infer that even if an agency does not have the information union has requested, the agency's duty to respond requires that the agency at least submit a response to the union explaining that such is the case. *Id.*

In this matter, the Board agrees with AFGE that DOH's defense that it (DOH) did not need to respond to the AFGE's request because AFGE's request was too narrow and/or because the information did not exist is "unavailing." (Motion for Decision at 5). Furthermore, the Board finds that both the December 28 RIF order and DOH's reported internal "finding" that the CSFP had not been "contracted out" encompassed information that was necessary and relevant to AFGE's request and should have been disclosed. *Azabu USA (Kona) Co., supra,* 298 N.L.R.B. 702. Therefore, the Board denies DOH's request for additional briefing on whether DOH was obligated to respond to AFGE's request based on the argument that the information sought "did not exist." (Response to Motion for Decision at 1, and Reply to Reply to Response to Motion for Decision at 1).

2. Requests to Stipulate to the Facts and to Authenticate Documents Provided in the Pleadings

In DOH's Response to Motion for Decision, the DOH requested that the parties stipulate to the facts and further that they stipulate to the authenticity of the documents attached to the pleadings. (Response to Motion for Decision at 1). The Board agrees with AFGE that neither is necessary. (Reply to Response to Motion for Decision at 1). First, authenticating the documents attached to the pleadings is not necessary because neither party has raised a question about the authenticity of the attachments. Rule 520.6 states: "[a] respondent shall file ... an answer containing a statement of its position with respect to the allegations set forth in the complaint." The Rule further states that the "answer shall also include a statement of any affirmative defenses...." DOH, in its Answer, did not question the authenticity of any of the documents attached to AFGE's Complaint. As such, the Board finds that the parties have already, in essence, stipulated to the authenticity of the attachments and do not need to do so again.

DOH's request that the parties stipulate to the facts as they are stated in the pleadings is likewise unnecessary. As stated previously, the key facts in this matter are undisputed and therefore already, in essence, stipulated to by the parties. *Id.*

3. Requests to Admit Affidavit and for Additional Briefing / Arguments

In DOH's Response to Motion for Decision, DOH requested that the Board amend the record to "include an affidavit from [Mr. Jackson]..., concerning his conversation with [Mr. Mayfield]... on or around January 22, 2009." (Response to Motion for Decision at 2). The affidavit states that Mr. Jackson verbally expressed to Mr. Mayfield that DOH needed more time to respond to AFGE's request, and that, based on an analysis it [(DOH)] was [then] conducting as to whether or not the CSFP was being contracted out, there may not be any information to provide. (Response to Motion for Decision at Exhibit #1). AFGE did not deny this characterization of the discussion, which DOH presented in part in its Answer, and more fully in the affidavit. (Answer at 2, and Response to Motion for Decision at Exhibit #1). The Board therefore accepts as fact the above characterization of the conversation.

AFGE's argument against the admission of the affidavit, however, is the legal contention that the Affidavit should not be admitted into evidence because it was not offered in DOH's original pleading, i.e. Answer. (Reply to Response to Motion for Decision at 2). AFGE seems to argue that the Board should consider only the original Complaint and Answer when invoking Rule 520.10 and deciding a case on the pleadings. *Id.* at 1-2. AFGE argued that "if the PERB is inclined to take evidence in this case, such as the affidavit submitted by DOH, the matter is obviously no longer one where a decision is being made on the pleadings." *Id.* at 2. In addition, AFGE argued that it was "unaware of any legal issues, presumably raised in the complaint and answer in this case, that cannot be decided on the basis of those pleadings[.]" *Id.* at 1-2. Then, AFGE seemed to contradict itself and argued that "[w]ithin the four [(4)] corners of the four [(4)] pleadings in this case is [*sic*] all of the argument and undisputed facts on every issue pursued by the Union that the PERB needs to make a decision based on the pleadings." *Id.* at 2. AFGE, however, did not indicate which four (4) pleadings it was referring to.

Notwithstanding, Rule 520.10 states that "[t]he parties shall submit to the Board or its designated representative evidence relevant to the complaint[,]" and that such evidence "may include affidavits or other documents, and any other material matter." (Emphasis added). Under the Rule, all documents and evidence properly and timely submitted to the PERB can be considered by the Board when it renders a decision on the pleadings. As such, the Board grants DOH's request and will consider DOH's affidavit in its final decision.

As a consequence of the Board allowing DOH's affidavit, AFGE requested an opportunity to substantively brief or argue a "substantive response to DOH's [Response to

Motion for Decision]." (Reply to Response to Motion for Decision at 2). Such is not necessary, however, because Rule 520.10 expressly allows the Board to consider "affidavits" and "any other material matter" when rendering decisions based on the pleadings. Furthermore, the inclusion of the affidavit does not change or impact the dispositive underlying facts in this case. The affidavit proffered that DOH needed more time to respond to AFGE's request (which acknowledged that DOH at least understood it had an obligation to respond) and warned AFGE that there may not be any documents to present should the DOH determine that the CSFP was not contracted out. (Response to Motion for Decision at Exhibit #1). Such does not change the Board's finding that DOH never complied with its obligation to respond to AFGE's request, including, but not limited to, providing AFGE with copies of the December 28, 2009, RIF order, and its "finding" that the CSFP had not been contracted out, which DOH admitted it completed sometime prior to March 16, 2009. (Answer at 2-3). AFGE's request for additional briefing and/or oral arguments on these questions is therefore denied.

C. Decision

Returning to the original allegations raised by AFGE in the Complaint, and in reliance upon all of the pleadings submitted by the parties, the Board finds that the DOH failed and refused to provide the information requested by AFGE, and therefore engaged in an unfair labor practice in violation of the CMPA.

As previously stated, agencies are obligated to provide documents in response to a request made by a union to the extent said documents encompass necessary and relevant information." *AFGE, Local 631 v. D.C. Water and Sewer Authority*, *supra*, Slip Op. No. 924 at p. 5-6, PERB Case No. 08-U-04, *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 3-4, PERB Case 09-U-65, and *Azabu USA (Kona) Co., supra,* 298 N.L.R.B. 702. When an agency has failed and refused, without a viable defense, to produce information that the union has requested, the agency resultantly fails to meet its statutory duty to bargain in good faith and has therefore violated D.C. Code § 1-617.04(a)(5). *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65. In addition, "a violation of the employer's statutory duty to bargain [under D.C. Code §1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with the employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing" found in D.C. Code §1-617.04(a)(1). *Id.*

It is undisputed that AFGE's January 6 letter properly requested information from DOH regarding its imminent plans for the CSFP. It is further undisputed that on that date, DOH had in

its possession the December 28, 2008, RIF order that was signed by the Mayor, but failed to provide AFGE a copy of said order. It is undisputed that CSFP's employees were RIF'd on or about January 30, 2009. It is undisputed that by February 23, 2009, the date of AFGE's Complaint, DOH still had not responded to AFGE's request in any way other than to verbally request more time to comply with the request, with which it never followed through. It is undisputed that DOH failed to provide the information requested by AFGE despite AFGE's three (3) diligent and timely inquiries about the status of the request. Finally, it is undisputed that by March 16, 2009, the date of DOH's Answer, the DOH had "found" that the January 30 RIF was not a "contracting out" of the services provided by the CSFP, and that the DOH had failed to provide AFGE with a copy of said finding.

The Board finds that DOH's contention that it failed to respond to AFGE's information request because the requested information did not exist was not a viable defense for said failure. *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65. Indeed, the December 28 RIF order and the DOH's internal "finding" that the CSFP had not been contracted out did exist and were necessary and relevant documents to AFGE's ability to timely "investigate any grievances or competently consult and negotiate with DOH over the closure of the CSFP and the RIF of bargaining unit employees," and therefore should have been provided. *Id. at p. 3-4*; *Azabu USA (Kona) Co., supra,* 298 N.L.R.B. 702; and Motion for Decision at 4. Even if, *arguendo*, the requested information did not exist, or even if AFGE's request was too broad or too specific, DOH had a duty to submit a response to AFGE explaining as much, which it likewise failed to do. *Id.* Furthermore, Mr. Jackson's verbal statements to Mr. Mayfield on January 22, 2009, detailed in DOH's affidavit, cannot be construed as adequate responses to AFGE's request in and of themselves. Rather, the Board finds that Mr. Jackson's statements constituted nothing more than a request for additional time to respond to AFGE's request and a consequential acknowledgment by DOH that it knew it had an obligation to timely respond to said request. *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 3-5, PERB Case 09-U-65 (holding that it is not enough that the agency respond, but it must do so in a timely manner).

Wherefore, because DOH failed and refused, without a viable defense, to produce the information that AFGE requested and, as a result, failed to meet its statutory duty to bargain in good faith, it therefore violated D.C. Code § 1-617.04(a)(5). *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65. By so doing, DOH further derivatively violated its counterpart duty not to interfere with its employees' statutory rights to organize a labor union free from interference, restraint or coercion; to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives

of their own choosing" found in D.C. Code §1-617.04(a)(1). *Id.* The Board therefore finds that DOH's conduct in this matter constituted an unfair labor practice.

D. Remedy

In accordance with the Board's finding that DOH's conduct constituted an unfair labor practice under the CMPA, the Board now turns to the question of what constitutes an appropriate remedy. AFGE asked the Board to order DOH to: 1) cease and desist from violating the CMPA in the manner alleged or in any like or related manner and to immediately provide AFGE with the requested information; 2) pay AFGE's costs; 3) post a notice; and 4) "[d]esist from or take such affirmative action as effectuates the policies and purposes of the [CMPA]." (Complaint at 3).

The Board finds it reasonable to order DOH to cease and desist from violating the CMPA in the manner alleged or in any like or related manner. The Board further finds it reasonable to order DOH to "[d]esist from or take affirmative action as effectuates the policies and purposes of the [CMPA]." *Id.*

The Board finds it reasonable to order DOH to immediately deliver to AFGE any and all information it has related to the January 30, 2009, RIF of the CSFP's bargaining unit employees including, but not limited to, a copy of the December 28, 2008, RIF order signed by the Mayor and a copy of its analysis detailing the reasons why the RIF was not a "contracting out" of the CSFP. *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 5, PERB Case 09-U-65.

In addition, the Board finds it reasonable to order DOH to post a notice acknowledging its violation of the CMPA, as detailed herein. When a violation of the CMPA has been found, the Board's order is intended to have a "therapeutic as well as a remedial effect" and is further to provide for the "protection of rights and obligations." *Id.* (quoting *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority* 47 D.C. Reg. 7551, Slip Op. No. 635 at pgs. 15-16, PERB Case No. 99-U-04 (2000)). It is this end, the protection of employees' rights, that "underlies [the Board's] remedy requiring the posting of a notice to all employees" that details the violations that were committed and the remedies afforded as a result of those violations. *Id.* (quoting *Charles Bagenstose v. District of Columbia Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991)). Posting a notice will enable bargaining unit employees to know that their rights under the CMPA are fully protected. *Id.* It will likewise discourage the Agency from committing any future violations. *Id.*

AFGE further requested that DOH be ordered to pay "the Union's costs in this matter." (Complaint at 3). D.C. Code § 1-617.13 authorizes the Board "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." This does not, however, include an award of attorneys' fees. *AFGE, Local 2725 v. D.C. DOH, supra*, Slip Op. No. 1003 at p. 6, PERB Case 09-U-65 (citing *International Brotherhood of Police Officers, Local 1445, AFL-CIO/CLC v. District of Columbia General Hospital* 39 D.C. Reg. 9633, Slip Op. No. 322, PERB Case No. 91-U-14 (1992) and *University of the District of Columbia Faculty Association NEA v. University of the District of Columbia*, 38 D.C. Reg. 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). Any portion of AFGE's request involving attorneys' fees is therefore denied.

The circumstances under which the Board warrants an award of costs were articulated in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02 (1990), in which the Board stated:

> [A]ny 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 face 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 situations 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 bargaining representative.

In the instant matter, the Board found that DOH failed and refused, without a viable defense, to produce the information that AFGE requested despite DOH's express acknowledgments that it had the information and that it knew it was required to produce the information, all of which impeded AFGE's ability to timely "investigate any grievances or competently consult and negotiate with DOH over the closure of the CSFP and the RIF of bargaining unit employees," in violation of the CMPA. (Motion for Decision at 4). The Board found that in so doing, DOH failed to meet its statutory duty to bargain in good faith, that its defenses were wholly without merit, and that its actions reasonably and foreseeably undermined AFGE's ability to fulfill its duties on behalf of the bargaining unit employees that were RIF'd.

Id. Wherefore, in light of these findings, the Board further finds that it is reasonable that the awarding of costs in accordance with AFGE's request would serve and meet the "interest-of-justice" test articulated in *AFSCME, supra.*

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health ("DOH") shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) ("CMPA") in the manner alleged or in any like or related manner.

2. DOH shall deliver to American Federation of Government Employees, AFL-CIO Local 2978 ("AFGE" or "union"), within fourteen (14) days of the date of this Order, any and all information it has related to the January 30, 2009, Reduction-in-Force ("RIF") of the Community Supplemental Food Program's ("CSFP") bargaining unit employees including, but not limited to, a copy of the December 28, 2008, RIF order signed by the Mayor and a copy of its analysis detailing the reasons why the RIF was not a "contracting out" of the CSFP.

3. DOH shall pay AFGE's costs in this matter.

4. Within fourteen (14) days of the service of this order, AFGE shall submit to the Public Employee Relations Board ("PERB" or "Board") a written statement of actual costs incurred in processing this unfair labor practice complaint. Said statement shall be filed along with any and all supporting documentation. DOH may file with the PERB a response to AFGE's statement of actual costs within fourteen (14) days of the service of said statement.

5. DOH shall conspicuously post, within ten (10) days of the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. Said Notice shall remain posted for thirty (30) consecutive days.

6. DOH shall desist from or take affirmative action as effectuates the policies and purposes of the CMPA.

7. Within fourteen (14) days of the service of this Decision and Order, DOH shall notify the Board, in writing, that the Notice has been posted as ordered. In addition, within fourteen

(14) days from the service of this Decision and Order, DOH shall notify the Board of the steps it has taken to comply with paragraphs 1, 2, and 6 of this Order.

8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

January 31, 2013

Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH ("DOH"), 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. 1356, PERB CASE NO. 09-U-23 (January 31, 2013).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered DCRA 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. 1356.

WE WILL cease and desist from failing and refusing to bargain in good faith with American Federation of Government Employees, AFL-CIO Local 2978 ("AFGE"), by failing, without a viable defense, to produce requested information that is necessary and relevant to AFGE's ability to timely investigate any grievances or competently consult and negotiate with DOH on behalf of bargaining unit employees.

District of Columbia Department of 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 ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

January 31, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-23, Slip Op. No. 1356, was transmitted via U.S. Mail and e-mail to the following parties on this the 1st day of February, 2013.

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