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