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**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
Psychologists Union of the D.C. Department of Mental Health Services, Local 3758, AFSCME, 1199 (NUHHCE) National Union of Hospital and Health Care Employees, AFL-CIO,	)	
	)	
Complainant,	)	PERB Case No. 02-U-17
	)	Opinion No. 681
v.	)	
	)	MOTION FOR PRELIMINARY
District of Columbia Department of Mental Health,	)	RELIEF
	)	
Respondent.	)	

**DECISION AND ORDER**

On May 1, 2002, the Psychologists Union of the D.C. Department of Mental Health Services, Local 3758, AFSCME, 1199 (NUHHCE) National Union of Hospital and Health Care Employees, AFL-CIO, ("Complainant") filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief, in the above-referenced case. The Complainant alleges that the District of Columbia Department of Mental Health ("Respondent" or "DOMH") violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed.) by refusing to bargain "over the impact, effect and implementation of the Employer's unilateral decisions affecting working conditions, including its decisions, effective May 1, 2002, to change psychologists' established duty hours." (Compl. at p.1) In addition, the Complainant asserts that the Respondent has refused to engage in impact and effect bargaining concerning the: (1) reassignment of psychologists; and (2) initiation of an on-call system. (Compl. at pgs 1-2). Also, the Complainant claims that the Respondent has refused to "provide the Union with information relevant and necessary to carrying out its function as the exclusive bargaining representative." (Compl. at p. 2) The Complainant is asking the Board to: (1) find that the Respondent has violated D.C. Code §1-617.04(a)(1) and (5) (2001 ed.); and (2) grant their request for Preliminary Relief.

The Respondent filed an answer to the Unfair Labor Practice Complaint denying all the substantive charges in the Complaint. In addition, the Respondent filed a response opposing the Complainant's Motion for Preliminary Relief. In its submissions, the Respondent asserts that it has engaged in impact and effect bargaining. As a result, the Respondent contends that both the Motion for Preliminary Relief and the Unfair Labor Practice Complaint should be dismissed.

The Complainant's Motion for Preliminary Relief is before the Board for disposition. For the reasons noted below, we find that the Complainant's request for preliminary relief does not meet the threshold criteria that the Board has adopted for granting such relief. Specifically, the Complaint does not establish that there is reasonable cause to believe that the Comprehensive Merit Personnel Act (CMPA) has been violated and that remedial purposes of the law will be served by pendent lite relief. As a result, we deny the Complainant's request for preliminary relief and direct that a hearing be scheduled in this case.

The Complainant claims that in February 2002, the union began hearing that the Respondent was planning to make changes to the Community Services Agency (CSA) of the Department of Mental Health Services. The Complainant asserts that these planned changes "would have profound effects on the working conditions of the Union's members." (Complainant's Motion at p. 4) As a result, Union President Stephen Fitzgerald claims that on March 1, 2002, he requested that the Respondent engage in bargaining "prior to the implementation of any such changes on the impact and effects on the terms, conditions of employment and compensation related to such changes." (Complainant's Motion at p. 4).

The Complainant acknowledges that the Respondent has met with the Complainant and with various other unions. However, the Complainant contends that the Respondent has failed to provide "specific information about the procedures it intends to use in implementing the on-call system, the reassignments, or the changes in duty hours." (Complainant's Motion at p. 7) In addition, the Complainant alleges that DOMH has failed to provide "any information concerning which individual psychologists will be reassigned or subjected to changes in shift hours." (Complainant's Motion at p. 7) Furthermore, the Complainant asserts that despite "repeated requests that the Employer engage in impact and implementation bargaining prior to any implementation of the Employer's proposed changes, the Employer has gone ahead and begun implementing changes to the working conditions of psychologists in the CSA without first engaging in the requested bargaining." (Complainant's Motion at p. 8) The Complainant claims that the Respondent's actions violate the CMPA. In addition, the Complainant contends that the violations committed by the Respondent are "clear-cut and flagrant and [have] a widespread impact both on members of the Union and on clients of the D.C. Department of Mental Health." (Complainant's Motion at p. 2). In light of the above, the Complainant filed their Complaint and Motion for Preliminary Relief.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 provides in pertinent part as follows:

The Board may order preliminary relief . . . where the Board finds that the conduct is clear-cut and flagrant; or the effect of the alleged unfair labor practice is widespread; or the public interest is seriously affected; or the Board's processes are being interfered with, and the Board's ultimate remedy may be clearly inadequate.

The Board has held that its authority to grant preliminary relief is discretionary. See, AFSCME, D.C. Council 20, et al. v. D.C. Government, et al., 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, the Board has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1971). There, the Court of Appeals - addressing the standard for granting relief before judgment under Section 10(j) of the National Labor Relations Act - held that irreparable harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051. "In those instances where [PERB] 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." Clarence Mack, et al. v. FOP/DOC Labor Committee, et al., 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its answer, the D.C. Department of Mental Health disputes the material elements of all the allegations asserted in the Complaint. We have held that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 6067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998). Whether the Respondent's actions occurred as the Complainant claims, or whether such actions constitute violations of the CMPA, are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

In the present case, the Complainant's claim that DOMH's actions meet the criteria of Board Rule 520.15, are little more than repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of DOMH's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOMH's actions presumably affect all bargaining unit members who are affected by the changes which have been implemented at the CSA. However, DOMH's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMPA asserts that District agencies are prohibited from engaging in unfair labor practices, the alleged violations, even if determined to be valid do not rise to the level of seriousness that would undermine public confidence in DOMH's ability to comply with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution processes, the Complainant has presented no evidence that these processes would be compromised, or that eventual remedies would be inadequate, if preliminary relief is not granted.<sup>1</sup>

Under the facts of this case, the alleged violations and their impact, do not satisfy any of the criteria prescribed by Board Rule 520.15. Therefore, we find that the circumstances presented do not appear appropriate for the granting of preliminary relief.

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<sup>1</sup>We note that the Unfair Labor Practice Complaint and Motion for Preliminary Relief were not filed prior to DOHM implementing some of the changes. Instead, the Complaint was filed on May 1, 2002, the same date that some of the changes were to be implemented. Therefore, the Board could not act on the Complainant's request prior to the Respondent's implementation of some of the changes.

In conclusion, the Complainant has failed to provide evidence which demonstrates that the allegations, even if true, are such that the remedial purposes of the law would be served by pendente lite relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Complainant following a full hearing. In view of the above, we deny the Complainant's Motion for Preliminary Relief.

For the reasons discussed above, the Board: (1) denies the Complainant's Motion for Preliminary Relief; and (2) directs the development of a factual record through an unfair labor practice hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The Complainant's Motion for Preliminary Relief is denied.
2. This case is to be scheduled for a hearing beginning in either July 2002 or August 2002.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

June 27, 2002

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 02-U-17 was transmitted via Fax and U.S. Mail to the following parties on this 27<sup>th</sup> day of June, 2002.

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