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Government of the District of Columbia
Public Employee Relations Board

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| _____) | | |
| In the Matter of:) | | |
| Marsha Karim,) | | |
| Complainant,) | PERB Case No. 10-U-17 | |
| v.) | Opinion No. 1310 | |
| District of Columbia Public Schools,) | | |
| Respondent.) | | |
| _____) | | |

DECISION AND ORDER

I. Statement of the Case

Marsha Karim ("Complainant") filed the instant Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools ("Respondent" or "DCPS"). The Complaint alleges that Respondent violated D.C. Code § 1-617.04(a)(1), (3), and (4) of the Comprehensive Merit Personnel Act ("CMPA") by retaliating against the Complainant in response to her involvement in a protected activity. (Complaint at 1).

DCPS filed an Answer to the Unfair Labor Practice Complaint ("Answer"), denying any violation of the CMPA. (Answer at 8). In addition, as an affirmative defense, DCPS contends that "[t]he Complainant fails to state a claim for which relief can be granted, in that the Complaint does not allege any facts that constitute an unfair labor practice in violation of Sections 1-617.04(a)(1) and (5) of the CMPA." (Answer at 3). The Complaint and Answer are before the Board for disposition.

II. Discussion

The Complainant alleges the following facts in support of her Complaint:

On or about January 1, 1997, Karim was elected to serve as a WTU Building Representative for her fellow teachers at the high

school where she was teaching. She has continued to serve in that capacity and was serving as the WTU Building Representative while employed by [DCPS] as a social studies teacher assigned to Eastern Senior High School since February 1, 2000.

In the months preceding the [DCPS's] implementation of the reduction-in-force during the fall of 2009 and specifically on May 20, 2009, Complainant had cause to file grievances on behalf of Bernard Nedab and Burnell Irby, two members of the WTU bargaining unit at Eastern Senior High School who had been removed from their respective positions as the School's basketball and football coach. Both grievances alleged Principal Chiselom had violated those individuals' rights under the parties' Collective Bargaining Agreement by failing to provide them proper and timely notice as required by the agreement.

Thereafter, on or about June 15, 2009, as the WTU Building Representative, Complainant Karim served [DCPS] Chancellor Michelle Rhee and her Assistant Superintendent for Eastern SHS, John Davis, with a 38 paragraph memorandum describing numerous infractions of the parties' Agreement as well as alleged violations of federal law carried out by Principal Chiselom, entitled "Mr. Chiselom, Principal of Eastern Senior High School... Unprofessional and Discriminatory Conduct Directed at Selected Eastern Teachers," conduct and events stated to have transpired at the School during School Year 2008-2009.

On August 17, 2009, Principal Chiselom directed Complainant Karim "to be quiet for 30 days - if she continued to oppose his efforts to restructure Eastern's faculty her contract would be eliminated."

On August 21, 2009, Complainant suffered a compensable injury in the course of her employment at Eastern Senior High School and was on leave thereafter as a consequence of that injury through and including October 2, 2009.

On October 2, 2009, Complainant Karim was informed by Respondent that it had decided to eliminate her position effective November 2, 2009. That October 2, 2009, letter notifying Complainant that DCPS was including her among the teachers whose employment was to be terminated in the October 2, 2009, reduction-in-force was not accompanied by any documentation utilized to support that determination and specifically did not include the Competitive Level documentation that Eastern Senior

High School Principal Chiselom would have been required to prepare in preparation for the reduction-in-force.

After she received [DCPS's] October 2, 2009, letter informing her that she had been selected by [DCPS] to be included among those teachers subject to the reduction-in-force, Complainant Karim wrote the Schools to request that the Competitive Level documentation DCPS's management had relied upon in decided to eliminate her position be provided to her.

On or about October 14, 2009, Traci Higgins, Respondent's Director of Labor Management and Employee Relations, responded to Complainant's request and provided the Competitive Level Documentation Form and the associated Competitive Level Ranking Score Card. Eastern Senior High School Principal Chiselom prepared the Competitive Level Ranking Score Card that was used by Chancellor Rhee to rank Complainant for purposes of implementing the reduction-in-force and on each of the three (3) factors Chiselom was permitted to rank Complainant Karim, "Needs of the School," "Relevant significant contributions, accomplishments, or performance," and "Relevant supplemental professional experience as demonstrated on the job," Chiselom entered a rating of zero (0). Those three factors rated by Principal Chiselom constituted 95% of Complainant's ranking under the weighted ranking in the competitive level established by the Chancellor which was limited to the Social Studies Teachers at Eastern Senior High School. The only other factor used in the ranking involved was computed by [DCPS's] Human Resources Department and incorporated another element within Principal Chiselom's sole control - whether Complainant received an "exceeds expectations evaluation" - into this fourth factor that provided in total only 5% of the weighted rating. A true and accurate copy of the Competitive Level Ranking Score Card prepared by Principal Chiselom and obtained by Complainant after she was informed her position had been eliminated is attached as Exhibit A.

Moreover, Principal Chiselom completed the Competitive Level Documentation Form for his rating of Complainant Marsha Karim with respect to "Needs of the Schools" as follows:

Mrs. Marsha Karim has utilized a lot of her time and efforts to oppose the vision and instruction of school administration. Ms. Karim is knowledgeable of her discipline. She has high expectations for students. However, the techniques and strategies of

delivering instruction she uses are ineffective. This is evident because she has a very high failure rate. Ms. Karim's negative attitude has an impact on the staff as a whole. Ms. Karim wastes a lot of time focusing on things that are not related to the classroom. Her poor attendance weighs (sic) heavily on the school. She has very poor attendance.

On the two other factors for which he provided the rating for Complainant Chiselom responded "None observed." A true and accurate copy of the Competitive Level Documentation Form prepared by Principal Chiselom and obtained by Complainant after she was informed her position had been eliminated is attached as Exhibit B.

Complainant's employment with the District was terminated and her position as a Social Studies Teacher was eliminated effective November 2, 2009.

By and through its reliance of Principal Chiselom's Competitive Level Documentation Form and the associated Competitive Level Ranking Score Card with respect to Complainant in terminating Complainant Karim's employment, Respondent DCPS and Chancellor Rhee thereby interfered [with], restrained, coerced, and discriminated against Complainant Marsha Karim in and for the exercise of her protected rights.

The Respondent's termination of Complainant Marsha Karim's employment is in retaliation for her invocation of her protected right as a District employee to initiate grievances and to serve as an elected representative of her Union.

(Complaint at 5-8).

As a remedy for the alleged violations of D.C. Code § 1-617.04(a)(1), (3), and (4), the Complainant asks that the Board issue an Order directing the Respondent to:

- a) Immediately reinstate Complainant Karim to her position of record as a teacher in the employ of DCPS prior to her unlawful termination;
- b) Rescind the October 2, 2009, notice that her position as a Social Studies teacher was being eliminated as part of a reduction-in-force and to expunge all references to this illegal personnel action from her official personnel file;

- c) Abide by and comply with its obligation to honor and respect Employee Karim's rights as a District employee as set forth in D.C. Code § 1-617.06, and specifically her right to serve as an elected union official and to initiate and pursue grievances in accordance with the provisions of the parties' Agreement;
- d) Cease and desist from acting to interfere [with], restrain, and coerce Complainant Marsha Karim in the exercise of her protected rights;
- e) Cease and desist from discriminating and retaliating against Karim because of her protected activities as a union officer, activist and employee grievant;
- f) Make Complainant Karim whole for the losses she has suffered and for any benefits or compensation she has been denied;
- g) To pay interest on any back pay, through the date it is actually paid to Complainant;
- h) Pay Complainant the reasonable attorneys' fees and costs she has incurred in this matter;
- i) Post notices about the alleged violations cited in this complaint; and
- j) Any other remedy that the Public Employee Relations Board deems appropriate.

(Complaint at 8-9).

Although DCPS concurs with several of the Complainant's factual allegations, it denies any violation of the CMPA. Specifically, DCPS "admits that at some time during Complainant's tenure at Eastern Senior High School, she did serve as a Building Representative on behalf of the WTU." (Answer at 6). Although DCPS admits that grievances were filed, it "denies that there is any correlation between the filing of these grievances and the separation" of the Complainant. *Id.* In addition, DCDPS "admits that [on] or about June 2009 Complainant presented a Memorandum to Management outlining a number of alleged infractions by Chiselom," but "denies that the allegations contained in that memorandum were meritorious." (Answer at 7). Additionally, DCPS denies the allegations that Chiselom directed Complainant Karim "to be quiet for 30 days – if she continued to oppose his efforts to restructure Eastern's faculty her contract would be eliminated." *Id.* DCPS admits the allegations that the Complainant was informed by Respondent that it had decided to eliminate her position effective November 2, 2009, and "admits the allegations presented in paragraph thirteen of the Complaint except insofar

as it denies that the element of 'Exceeds Expectation Evaluation' of the Competitive Level Ranking Score Card was in the sole control of Chiselom." (Answer at 7).

As an affirmative defense, DCPS contends that "[t]he Complainant fails to state a claim for which relief can be granted, in that the [Complaint] is a thinly-veiled attempt to challenge a lawfully-conducted RIF that occurred on October 2, 2009, and became effective November 2, 2009." (Answer at 9). DCPS alleges that "the fact that the WTU has not itself joined or advanced this ULP on behalf of the Complainant is the clearest evidence that it has concluded that this is an impermissible venue for seeking relief challenging a RIF." *Id.*

DCPS requests that the Board dismiss the instant Complaint, asserting that the Complainant's separation from her employment was due to a reduction-in-force, and that her Complaint fails to state a claim for which relief can be granted under the CMPA. (Answer at 9).

While a Complainant need not prove their case on the pleadings, they must plead or assert allegations that, if proven, would establish the alleged statutory violations. *See Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No. 491 at p. 4, PERB Case No. 96-U-22 (1996). Additionally, the Board views contested facts in the light most favorable to the Complainant in determining whether the Complaint gives rise to an unfair labor practice. *See JoAnne G. Hicks v. DC Office of the Deputy Mayor of Finance, Office of the Controller, and American Federation of State, County, and Municipal Employees, District Council 24*, 40 D.C. Reg. 1751, Slip Op. No. 303, PERB Case No. 91-U-17 (1992). "Without the existence of such evidence, Respondent's actions cannot be found to constitute the asserted unfair labor practice. Therefore, a Complaint that fails to allege the existence of such evidence does not present allegations sufficient to support the cause of action." *Goodine v. FOP/DOC Labor Committee*, 42 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

Board Rule 520.10 provides 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." Consistent with that rule, the Board finds that the circumstances presented in the instant case do not warrant a decision on the pleadings.

Here, issues of fact exist concerning whether DCPS violated the CMPA by terminating the Complainant in retaliation for her activity as a union representative. The Board has held that "the prominence and level of activity of the alleged discriminate, the asserted attitude of [the agency] toward this activity, and the timing of the activity with respect to the RIF provide sufficient *prima facie* elements of the alleged violations of [the CMPA]." *American Federation of Government Employees, Local 2725 v. DC Housing Authority*, 35 D.C. Reg. 3242, Slip Op. No. 514, PERB Case No. 96-U-24 (1997). The issue of whether DCPS's actions rise to the level of a violation of the CMPA is a matter best determined after the establishment of a factual record through an unfair labor practice hearing. *See Barganier v. FOP/DOCLC and DC DOC*, 45 D.C. Reg. 4013, Slip Op. No. 542, PERB Case No. 98-S-03 (1998).

The Board finds that the Complainant has pled or asserted allegations that, if proven, would constitute a statutory violation. Therefore, the Complaint will continue to be processed through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Public School's request for dismissal is denied.
2. The Board's Executive Director shall refer the Complainant's Unfair Labor Practice Complaint to a Hearing Examiner.
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
Washington, D.C.

August 21, 2012

CERTIFICATE OF SERVICE

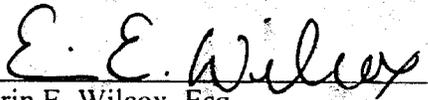
This is to certify that the attached Decision and Order in PERB Case No. 10-U-17 was transmitted via U.S. Mail and e-mail to the following parties on this the 21st day of August, 2012.

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