Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Washington Teachers' Union, Local #6, AFT, AFL-CIO,	
Complainant,	PERB Case No. 03-U-28 Opinion No. 710
v.	
District of Columbia Public Schools,	Motion for Preliminary Relief
Respondent.	

DECISION [1]

I. Statement of the Case

On April 11, 2003, the Washington Teachers' Union, Local #6, AFT, AFL-CIO ("Complainant", "WTU" or "Union"), filed an Unfair Labor Practice Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. The Complainant alleges that the District of Columbia Public Schools ("DCPS" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (5) (2001 ed.) by "unilaterally deciding to extend the school day, and therefore teachers' work days, by 45 minutes a day from March 27, 2003 to May 30, 2003." (Motion at p.1). WTU contends that this action was taken in order to make up for the extra snow days which occurred during the 2002-2003 school year. Furthermore, WTU claims that "DCPS made and implemented this decision without first giving the WTU notice and an opportunity to bargain." (Motion at p.1). The Complainant is asking the Board to grant their request for preliminary relief. In addition, WTU is requesting that the Board order DCPS to: (1) immediately engage in impact and effect bargaining over its snow day make up policy; (2) pay costs; (3) post a notice to employees; and (4) cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.). (Compl. at pgs. 2-3).

DCPS filed a response opposing the Complainant's Motion for Preliminary Relief. In its response, DCPS argues that the Complainant has not satisfied the criteria for granting preliminary

[1] In view of the time sensitive posture of this case, the Board issued its order on May 2, 2003 and advised the parties that this Decision would follow. The May 2nd Order is attached to this Decision.

relief. The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

WTU claims that on or about "February 28, 2003, representatives of DCPS met with representatives from WTU and other unions at DCPS to solicit ideas for how to make up for the snow days that exceeded this school year's two snow day allotment." (Compl. at p. 2). WTU asserts that on March 21, 2003, "DCPS announced that the extra snow days would be dealt with by lengthening the school days by 45 minutes each day for 40 days, and by making May 14, 2003, a scheduled staff development day, a regular school day." (Compl. at p. 2). Furthermore, WTU contends that "DCPS' March 21, 2003 announcement also stated that DCPS' extended day would go into effect on March 27, 2003." (Compl. at p.2). Finally, WTU claims that on March 27, 2003, DCPS implemented their decision (concerning the extended school day) without first giving WTU notice and the opportunity to bargain. In view of the above, WTU asserts that DCPS has failed and refused to bargain with the Union over a matter affecting terms and conditions of employment.

The Complainant argues that DCPS' actions violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.). As a result, the Complainant filed an unfair labor practice complaint and a 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 will 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 at., 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 response to the Motion, DCPS disputes the material elements of all the allegations asserted in the Motion. Specifically, DCPS claims that at the February 28th meeting, the parties discussed the number of days to be made up and various options for doing so. For example, DCPS asserts that "one proposed option included adding fifteen (15) minutes to the beginning of the school day and forty five (45) minutes to the end of the school day for the number of days needed to make up the six days of instruction lost due to inclement weather." [McCullough Declaration, ¶4].[2] However, DCPS alleges that "[d]uring the meeting, the WTU representative . . . indicated that a proposal to lengthen each school day one (1) hour would not be their choice. Instead they recommended that each day be lengthened forty-five (45)minutes . . . fifteen (15) minutes in the morning and thirty (30) minutes in the afternoon." [McCullough Declaration, ¶5] Moreover, DCPS contends that "the WTU leadership indicated that they preferred to lengthen the school day rather than add days to the school year, or cancel some spring break vacation days." [McCullough Declaration, ¶6]

In view of the above, DCPS asserts that the Superintendent's plan for making up snow days, incorporated the recommendations and preferences of the WTU. [McCullough Declaration, ¶8] Furthermore, DCPS claims that during the week of March 10, 2003, WTU's leadership was informed of the final plan and provided information concerning the March 27th implementation date. [McCullough Declaration, ¶9]

In light of the above, it is clear that DCPS disputes the material elements of the allegations in this case. 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).

Also, DCPS contends that by lengthening the school day, it is exercising a management right. The Board has held that "management's rights under D.C. Code § 1-617.08(a) (2001 ed.) do not relieve an agency of its obligation to bargain with the exclusive representative of its employees over the impact or effect of, and procedures concerning, the implementation of these management right decisions." IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312 at p. 3, PERB Case No. 91-U-06 (1994). The effect and impact of non-bargainable management decisions on terms and conditions of employment are, however, bargainable only upon request. Teamsters, Local 639 v. D.C. Public Schools, 30 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-

[2]All references to "McCullough Declaration" refer to the declaration of Janie McCullough dated April 25, 2003. Janie McCullough is the Director of Labor Management Partnerships for the District of Columbia Public Schools.

17 (1991). Furthermore, the Board has held that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.) by unilaterally implementing a management right decision under D.C. Code § 1.617.08(a) (2001 ed.), without notice or bargaining.[3] University of the District of Columbia Faculty Association v. University of the District of Columbia, 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). The issues concerning whether a labor organization has requested bargaining and whether bargaining occurred, are generally questions of fact to be determined after the establishment of a factual record. Therefore, the question of whether DCPS' 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 DCPS' 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 DCPS' actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DCPS' actions presumably affect all bargaining unit members, who are affected by the lengthening of the work day. However, DCPS' 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 DCPS' 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.[4]

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 believe that the facts presented do not

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[3]By contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required in order to establish a failure to bargain in good faith. Under such circumstances, management's right to bargain attaches to the matter implemented or changed, and management's unilateral action precludes any opportunity to make a request to bargain prior to implementation or change. See, AFGE, Local 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992).

[4]The Board notes that the unfair labor practice complaint and the motion for preliminary relief were not filed prior to DCPS implementing the extended school day. Therefore, the Board could not act on the Complainant's request for preliminary relief prior to the Respondent's implementation of the extended school day.

appear appropriate for the granting of preliminary relief.

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 which will be scheduled before May 23, 2003.

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

May 16, 2003

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ORDER

In view of the time sensitive posture of this case, the Board has decided to issue its Order now. A decision will follow. The Board, having considered the Complainant's Motion for Preliminary Relief, hereby denies the Complainant's Motion. In addition, this case is to be scheduled for a hearing to begin no later than May 23, 2003.

IT IS HEREBY ORDERED THAT:

1. The Complainant's Motion for Preliminary Relief is denied.

2. This case is scheduled for a hearing to begin no later than May 23, 2003.

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

May 2, 2003