Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Water & Sewer Authority,	
Complainant,	PERB Case No. 05-U-10
v.	Opinion No. 801
American Federation of Government Employees, Local 872,	MOTION FOR PRELIMINARY RELIEF
Respondent.	

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Water and Sewer Authority ("Complainant" or "WASA"), filed a document styled "Unfair Labor Practice Complaint and a Motion for Preliminary Relief" in the above-referenced case. In addition, WASA filed a second document styled "Amended Unfair Labor Practice Complaint and Motion for Preliminary Relief." The Complainant alleges that the American Federation of Government Employees, Local 872 ("Union", "Respondent" or "Local 872"), has violated D.C. Code § 1-617.04(b)(1) and (3) (2001 ed.) by failing to pay arbitration fees for those cases that it loses, effectively cancelling the grievance resolution process in the parties' collective bargaining agreement (CBA). The Complainant requests that the Board: (1) grant its request for preliminary relief; (2) order the Respondent to cease and desist from failing to bargain; (3) order the Respondent to pay its share of all outstanding arbitration costs; and (4) order a make whole remedy.

The Union filed an answer denying the allegations. In addition, the Respondent filed an Opposition to the Motion for Preliminary Relief.[1] In its Opposition, the Union claims that all the arbitration bills that formed the basis of the original complaint have been paid. Therefore, the Union argues that the Complainant has not demonstrated that preliminary relief is warranted.

The Complainant's Motion for Preliminary Relief is before the Board for disposition. For the reasons noted below, we find that the circumstances presented do not appear appropriate for the granting of preliminary relief.

II. Discussion

The grievance/arbitration procedures in the CBA allow only employees and/or the Union to file grievances. The CBA also provides that the losing party must pay the arbitrator's fee and expenses. WASA alleges that between August and November 2004 and January 2005, it received letters from arbitrators and the Federal Mediation and Conciliation Service (FMCS) giving notice of non-payment by the Union. The Complainant argues that as a result, some arbitrators have cancelled pending arbitrations. For example, one arbitrator refused to schedule any arbitrations for fear of giving the appearance of a conflict of interest. In view of the above, the Complainant asserts that numerous arbitrators, as well as the entire panel designated to hear expedited grievances under Article 59 "Expedited Arbitrations", have been compromised by the Respondent's repeated failure to pay the arbitration expenses. (Amended Motion at p. 5).

The Complainant alleges that at least two employees have been denied access to the negotiated grievance/arbitration procedure in violation of D.C. Code § 1-617.04(b)(1). (Amended Motion at p. 5). Further, the Complainant claims that the Union's actions have resulted in the inability of the parties to resolve grievances related to discipline and discharge in violation of D.C. Code § 1-617.04(b)(3). (Amended Motion at p 6.)

WASA requests preliminary relief stating that the Union's refusal to bargain is clear cut and

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[1]The Union also filed a document styled "Respondent's Motion to Dismiss Amended Unfair Labor Practice [Complaint]" on June 17, 2005. Pursuant to Board Rule 553.2, the Respondent's Opposition was due on June 29, 2005, the day that the Board was scheduled to have its regular meeting. However, the Board meeting was rescheduled and held on July 5, 2005. Unfortunately, in a letter dated June 27, 2005, the Board 's staff informed the Complainant that the Opposition to the Motion to Dismiss was due on July 8, 2005. As a result, the Board meeting was held prior to the date that the opposition was due. Therefore, the Board could not consider the Motion to Dismiss and is referring the Motion to Dismiss to the Hearing Examiner who has been assigned to this matter.

flagrant and that the Union has taken no steps to remedy its conduct since the filing of the original complaint in this matter. In addition, WASA asserts that the effects of the Respondent's refusal to pay for arbitration services are widespread and interfere with the Board's processes. Also, WASA contends that by refusing to pay for arbitrations, the Respondent has unilaterally interfered with and effectively suspended the parties' grievance resolution processes. As a result, WASA asserts that the evidence establishes reasonable cause to believe that the Comprehensive Merit Personnel Act (CMPA) has been violated and that the remedial purposes of the Act will be served by *pendente lite* relief.

Furthermore, WASA argues that the Respondent's unilateral cancellation of the grievance process necessarily interferes with the Board's administrative processes and that the Board's ultimate relief will be inadequate. WASA claims that unless preliminary relief is granted, the Union will continue to trample management and employees' basic rights under the CMPA. Finally, WASA asserts that the very employees the Union is charged with protecting will suffer irreparable harm. (Complaint and Motion at p.5). In view of the above, WASA contends that the Board should grant preliminary relief.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board rule 520.15, which provides in relevant 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 judgement 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 their answer to the Complaint, the Union has disputed material elements of all the allegations asserted by WASA. Specifically, the Union denies that there are any outstanding arbitration bills. It is clear that the parties disagree on the facts in this case. This Board has found that preliminary relief is not appropriate where the 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). The question of whether the Union's actions occurred as WASA alleges or whether such actions constitute an unfair labor practice are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

WASA has failed to prove that the Union's actions meet the criteria of Board rule 520.15. Specifically, the Union's actions appear to have affected a small number of employees and do not appear to be part of a pattern of repeated and potentially illegal acts. Also, even if the allegations are ultimately found to be valid, it does not appear that any of the Union's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. Finally, while the CMPA prohibits District agencies from engaging in unfair labor practices, the alleged violations, even if proved, do not rise to the level of seriousness that would undermine public confidence in PERB's ability to enforce the CMPA.

In view of the above, we conclude that WASA 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 WASA following a full hearing. Therefore, we find that the facts presented are not appropriate for the granting of preliminary relief.

For the reasons discussed above, the Board: (1) denies the Complainant's request for preliminary relief, and (2) directs the development of a factual record through a hearing, according to the schedule set forth below.

ORDER

IT IS HEREBY ORDERED THAT:

(1) The District of Columbia Water and Sewer Authority's Motion for Preliminary Relief is denied.

(2) The Respondent's Motion to Dismiss is referred to the Hearing Examiner for disposition.

(3) The Board's Executive Director shall refer the unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.

(4) A hearing shall be held in this case before August 29, 2005. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

(5) Following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments or submission of the parties' post-hearing briefs.

(6) The parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

(7) 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.

July 29, 2005

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No.05-U-10 was transmitted via Fax and U.S. Mail to the following parties on this the 29th day of July 2005.

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