Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of State, County, and Municipal Employees, District Council 20, Local 2921,	PERB Case No. 13-U-09
Complainant,	Opinion No. 1440
v.	Motion to Dismiss
District of Columbia Public Schools,	Motion for Extension of Time To File Opposition to Motion to Dismiss
and	
District of Columbia Office of the State Superintendent of Education,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of State, County and Municipal Employees, District Council 20, Local 2921 ("Complainant" or "AFSCME" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS") and the District of Columbia Office of the State Superintendent of Education ("OSSE") (collectively, "Respondents"), alleging Respondents violated D.C. Code § 1-617.04(a)(1) and (5) ("Comprehensive Merit Personnel Act" or "CMPA"), by 1) miscoding certain positions in the bargaining unit as non-union employees for several years and thereby causing those employees to be deprived of benefits and grievance rights and further causing the Union to be deprived of dues and agency fee revenue; and 2) failing to provide documents the Union had requested in accordance with the Collective Bargaining Agreement ("CBA") between DCPS and AFSCME. (Complaint).

In their Answer, Respondents denied they violated the CMPA and raised several affirmative defenses. (Answer). Respondents further filed a Motion to Dismiss the Complaint, to which AFSCME filed an Opposition. (Motion to Dismiss); and (Opposition to Motion to Dismiss).

II. Background

AFSCME alleges that it and DCPS are parties to a CBA that remains current and effective pending negotiation of a successor agreement. *Id.*, at 2. AFSCME further contends that OSSE is bound by that same CBA because "OSSE is a successor employer to the Union's bargaining unit members who were transferred to OSSE from DCPS." (Complaint, at 2).

On an unspecified date in 2012, AFSCME contends it became aware via employee complaints that DCPS and OSSE may have failed to include certain employees in the bargaining unit despite those employees filling bargaining unit positions. (Complaint, at 2). On July 20, 2012, AFSCME requested that Respondents' common representative, the District of Columbia Office of Labor Relations and Collective Bargaining ("OLRCB"), provide the Union with "a listing of all the grade 7 and below OSSE and DCPS employees with their job titles who are coded WAA-XGA-WAE or any other non-bargaining unit code who may do AFSCME bargaining unit work." *Id.* After discussions, AFSCME narrowed its request to include only detailed information from 2009-2011 and "snapshot lists" from 2005-2008. *Id.*, at 2-3. AFSCME alleges the information Respondents provided for 2009-2012 showed that DCPS and OSSE had multiple employees who had been performing bargaining unit work, but whose positions were miscoded as non-union positions. *Id.*, at 3-4. AFSCME alleges Respondents' miscoding of these positions caused the employees in those positions to be deprived of optical and dental benefits enjoyed by Union members, as well as other bargaining unit benefits and contractual protections outlined in the CBA. *Id.*, at 4. Additionally, AFSCME alleges the miscoding deprived the Union of substantial dues and agency fee revenue. *Id.*

AFSCME alleges that prior to receiving the above stated information from Respondents, it "could not know or confirm that these positions were miscoded." *Id.*

On November 15, 2012, AFSCME demanded in writing that Respondents recode the positions into the bargaining unit and pay the "uncollected dues." *Id.* AFSCME further demanded that Respondents provide the requested information from 2005-2008. *Id.* AFSCME alleges that as of December 17, 2012, the date of the Complaint, Respondents had not complied with those demands. *Id.*, at 5.

In its Answer, Respondents admit DCPS is subject to the stated CBA, but deny that the CBA applies to or binds OSSE. (Answer, at 2).

Further, Respondents admit they received AFSCME's information request from July 20, 2012, and that the request was later narrowed as described. *Id.*, at 2. Respondents deny AFSCME's interpretation of the information they provided related to 2009-2012 and deny that

any of the listed positions were miscoded. *Id.*, at 3-4. Additionally, Respondents deny the Union's assertion that it could not have known if the positions were miscoded prior to receiving the information Respondents provided on grounds that AFSCME "receives a quarterly dues list of employees indicating the number of members in the bargaining unit" and that "[a]t any time during the years prior to Respondents' response on October 19, 2012, the Union could have requested information pertaining to how many or which employees are properly coded as being in the certified bargaining unit." *Id.*, at 4.

Respondents admit they received AFSCME's demand from November 15, 2012, but assert they provided the requested information related to 2005-2008 via email on December 18, 2012, the day after AFSCME filed its Complaint. *Id.*, at 5.

In addition to denying AFSCME's assertion that they violated the CMPA, Respondents raised the affirmative defenses that: 1) AFSCME fails to state a cause of action for which PERB can grant relief; 2) the facts establish a contractual dispute that falls outside of PERB's jurisdiction; 3) even if there is a valid cause of action, such is precluded under the doctrine of laches since AFSCME has, at all material times since 2005, received monthly dues statements that AFSCME had an affirmative duty to examine for errors or omissions; 4) AFSCME's Complaint is untimely; 5) even if there is a cause of action, any back-dues owed would have to be collected from the employees themselves and not from Respondents; 6) placing the affected employees into the bargaining unit would have the practical effect of reducing their wages since they would be placed on a different wage schedule and should therefore only be done with the express written consent of each employee, which the Union failed to provide; and 7) AFSCME's request for costs is unwarranted by the facts alleged. *Id.*, at 5-7.

On January 11, 2013, Respondents filed a Motion to Dismiss arguing that the Complaint should be dismissed because: 1) AFSCME failed to state a claim for which PERB can grant relief; 2) AFSCME failed to establish that it and OSSE are parties to the CBA by way of successorship; 3) no employees represented by AFSCME, including those identified by AFSCME in its Complaint, were transferred to OSSE; 4) the requested information relating to 2005-2008 has been provided; and 5) the Complaint's allegations constitute a contractual dispute that falls outside of PERB's jurisdiction. (Motion to Dismiss).

On January 18, 2013, AFSCME filed a motion for an extension of time to file an opposition to Respondents' Motion to Dismiss stating that an "unanticipated increase in work ... since the motion was filed" had prevented it from being able to "devote sufficient time to respond to the motion within the allotted five days." (Motion for Extension to File Opposition, at 1-2). On January 25, 2013, AFSCME filed its Opposition to Respondents' Motion to Dismiss arguing it was "not required to prove its case within the four corners of the complaint" but instead only needed to allege facts that, "if proven," would constitute a violation of the CMPA. (Opposition to Motion to Dismiss, at 1-2) (citing *District of Columbia Nurses Association v. District of Columbia Department of Youth Rehabilitation Services*, 59 D.C. Reg. 12628, Slip Op No. 1262, PERB Case No. 12-U-19 (2012)). Further, AFSCME contends that in order to dismiss the case, "PERB would have to make certain factual conclusions" that cannot be determined by

the pleadings alone. *Id.*, at 4. As such, AFSCME argues PERB should deny Respondents' Motion and assign the matter for an evidentiary hearing. *Id.*, at 5.

III. Discussion

A. AFSCME's Motion for an Extension of Time to Respond to Motion to Dismiss

PERB has held its purposes are generally best served by considering all of the information available to the parties insofar as it is filed in timely manner and in accordance with PERB's Rules. See *American Federation of Government Employees, AFL-CIO, Local 2978 v. District of Columbia Department of Health*, 60 D.C. Reg. 2551, Slip Op. No. 1356 at p. 10-11, PERB Case No. 09-U-23 (2013).

PERB Rule 501.2 requires a request for an extension of time to be filed at least three (3) days prior to the expiration of the filing period, but further provides that exceptions can be granted "for good cause shown" as determined by the Executive Director.

Here, while AFSCME did not file its Motion for Extension to File Opposition three (3) days prior to the expiration of the filing period set by PERB Rule 553.2, the Board notes that the stated period was only five (5) days and in order to meet the deadline set by PERB Rule 501.2, AFSCME would have needed to file its request for an extension almost immediately after Respondents filed their Motion to Dismiss. Therefore, in the interest of serving PERB's purposes, PERB, in its discretion, grants AFSCME's Motion for Extension to File Opposition and adopts AFSCME's January 25, 2013, Opposition to Dismiss into the record for consideration. *AFGE v. DOH, supra*, Slip Op. No. 1356 at p. 10-11, PERB Case No. 09-U-23.

B. Respondents' Affirmative Defenses and Motion to Dismiss

When considering a motion to dismiss, PERB views the contested facts in the light most favorable to the Complainant to determine if the allegations may, if proven, constitute a violation of the CMPA. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, et al.*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09 (2009) (internal citations omitted). While a complainant does not need to prove its case on the pleadings, it must plead or assert allegations that, if proven, would establish a statutory violation of the CMPA. *Id.* If the record demonstrates that the allegations do concern violations of the CMPA, then PERB has jurisdiction over those allegations and can grant relief if they are proven. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013).

Here, PERB rejects Respondents' contentions that the facts in AFSCME's Complaint establish a contractual dispute that falls outside of PERB's jurisdiction, and that AFSCME fails to state a cause of action for which PERB can grant relief. (Answer, at 6); and (Motion to

Dismiss, at 1-2, 5-6). PERB precedent holds that when an agency unilaterally places bargaining unit employees in non-bargaining unit positions and thereby deprives the union of the dues it would have earned had the employees been correctly classified, the agency should be held liable for the reimbursement of the union's fees—not the incorrectly classified employees. *National Association of Government Employees, Local R3-06 v. District of Columbia Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at p. 16, PERB Case No. 99-U-04 (2000). Therefore, because AFSCME's allegations, if proven, could establish a statutory violation of the CMPA over which PERB has authority to grant relief, the Board finds that AFSCME has stated a sufficient cause of action and that PERB has jurisdiction over this matter. *FOP v. MPD, supra*, Slip Op. No. 984 at p. 6, PERB Case No 08-U-09; and *FOP v. MPD, supra*, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53.

Because Respondents' deny most—if not all—of AFSCME's allegations, PERB agrees with AFSCME that the Complaint cannot be dismissed at this time based solely upon the pleadings. (Opposition to Motion to Dismiss, at 4).

For instance, PERB cannot definitively conclude at this time that OSSE is a successor employer as AFSCME alleges. PERB has held that when "the functional role and employees of a public employer/agency are transferred to a new entity established to perform in the same capacity, ... the new agency is not a new employer for the purposes of collective bargaining" and "the entity [is thus] subject to the existing terms and conditions of employment contained in the collective bargaining agreement covering the employees placed under its authority." *American Federation of State, County and Municipal Employees, District Council 20, Locals 1200, 2776, 2401 and 2087 v. District of Columbia, et al.*, 46 D.C. Reg. 6513, Slip Op. No. 590 at p. 8, PERB Case No. 97-U-15A (1999) (internal citations omitted). In order to make such a determination, PERB looks to certain factors such as whether the "new employer uses the same facilities and work force to produce the same basic products or service for essentially the same customers in the same geographical area." *Id.* (citing *Valley Nitrogen Producers and International Union of Petroleum and Industrial Workers, Seafarers International Union of North America, AFL-CIO*, 207 N.L.R.B. 208 (1973)). Because the pleadings in the record do not provide enough information to apply these factors to the instant case, and based upon Respondents' assertion that "no employees within Complainant's bargaining unit were transferred from DCPS to OSSE", PERB cannot determine at this time whether OSSE is bound by the CBA between AFSCME and DCPS. *Id.*; and (Motion to Dismiss, at 2, 4).

Additionally, PERB cannot conclude at this time whether AFSCME's Complaint is timely under PERB Rule 520.4, which requires that "[u]nfair labor practice complaints ... be filed no later than 120 days after the date on which the alleged violations occurred." PERB does not have jurisdiction to consider unfair labor practice complaints filed outside of the 120 days prescribed by the Rule. *Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) (holding that "time limits for filing appeals with administrative adjudicative agencies...are mandatory and jurisdictional"). The 120-day period for filing a complaint begins when the complainant first knew or should have known about the acts giving rise to the alleged violation. *Charles E. Pitt v. District of Columbia Department of Corrections*,

59 D.C. Reg. 5554, Slip Op. No. 998 at p. 5, PERB Case No. 09-U-06 (2009). AFSCME contends it could not have known the employees were miscoded until October 19, 2012, when Respondents partially responded to its information request. (Complaint, at 4). Respondents contend that AFSCME knew or should have known about any discrepancies as early as 2005 on grounds that AFSCME has, at all material times since 2005, received monthly dues statements that it had an affirmative duty to examine for errors or omissions. (Answer, at 6).

Similarly, even if Respondents did provide all of the remaining information requested by AFSCME related to the coding of employees between 2005-2008 on December 18, 2013, it is still possible that Respondents violated D.C. Code §§ 1-617.04(a)(1) and (5) of the CMPA if AFSCME can prove that Respondents' production and delivery of the information was unreasonably or intentionally delayed. See *American Federation of Government Employees, Local 2725 v. District of Columbia Department of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 4, PERB Case 09-U-65 (2009) (holding that an agency's refusal, without a viable defense, to produce information duly requested by a union constitutes violations of D.C. Code § 1-617.04(a)(5), and, derivatively, D.C. Code § 1-617.04(a)(1)).

Finally, because Respondents deny AFSCME's core allegation that the employees in question were miscoded, it is impossible to make any definitive determinations regarding that allegation by relying solely upon the pleadings in the record. (Answer, at 3-4).

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." 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).

Therefore, based on the issues of fact discussed herein in addition to others presented in the parties' pleadings, PERB finds it would be inappropriate for PERB to render a decision on the pleadings. Respondents' Motion to Dismiss is therefore denied. Pursuant to PERB Rule 520.9, PERB refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5957, Slip Op. No. 999, PERB Case 09-U-52 (2009).

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's Motion for Extension to File Opposition is granted.

2. Respondents' Motion to Dismiss is denied.

3. PERB shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and make appropriate recommendations in accordance with said record.

4. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

October 31, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-09, Slip Op. No. 1440, was transmitted via File & ServeXpress™ and e-mail to the following parties on this the 13th day of November, 2013.

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