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

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| In the Matter of: | |
| Washington Teachers' Union, Local 6, American Federation of Teachers, | |
| Complainant, | PERB Case No. 14-U-02 |
| v. | Opinion No. 1452 |
| District of Columbia Public Schools | |
| Respondent. | |

## DECISION AND ORDER

### I. Statement of the Case

On October 24, 2013, Washington Teachers' Union, Local 6, American Federation of Teachers ("WTU" or "Union") filed an Unfair Labor Practice Complaint ("Complaint") against the District of Columbia Public Schools ("DCPS" or "Agency"). On October 25, 2013, the Union filed an Amended Unfair Labor Practice Complaint ("Amended Complaint"). On November 8, 2013, DCPS filed Respondent's Answer to Amended Unfair Labor Practice Complaint ("Answer").

On November 19, 2013, WTU filed Union's Motion for An Order Based on the Pleadings ("Motion on Pleadings"). On November 26, 2013, Agency filed a Motion to Dismiss and Opposition to Union's Motion ("Motion to Dismiss"). On December 2, 2013, WTU filed Union's Opposition to DCPS Motion to Dismiss ("Opposition to Motion to Dismiss").

## II. Background

On or about February 7, 2011, the Parties received an arbitration decision ("Award") from Arbitrator Charles Feigenbaum that granted the Union's grievance regarding the termination of eighty probationary DCPS teachers. (Amended Complaint at 1-2, Answer at 3). The Agency filed an arbitration review request with PERB, which was denied by the Board. (Amended Complaint at 2, Answer at 3). *See D.C. Public Schools and Washington Teachers' Union, Local 6,* 59 D.C. Reg. 6772, Slip Op. No. 1130, PERB Case No. 11-A-04 (2011). DCPS filed for review of PERB's decision in the D.C. Superior Court. (Amended Complaint at 2, Answer at 3). On April 3, 2013, the Superior Court denied review. (Amended Complaint at 2, Answer at 3). DCPS did not appeal the Superior Court's decision to the D.C. Court of Appeals. (Amended Complaint at 2, Answer at 3).

In its Amended Complaint, WTU alleges that "DCPS has failed and refused to comply with the [arbitration] award." (Amended Complaint at 2). DCPS denies WTU's allegation. (Answer at 3). DCPS asserts that the Complaint is untimely. (Answer at 3-4). In addition, DCPS asserts that it "has substantially complied with the arbitration decision." (Answer at 4).

## III. Discussion

### A. Motion to Dismiss on Timeliness of Complaint

DCPS asserts that WTU's Complaint is untimely. (Answer at 3-4). DCPS argues that the Arbitrator provided DCPS with a sixty (60) day timeframe to comply with the Award. (Answer at 4). DCPS argues that WTU's claim against DCPS became ripe after the Arbitrator's sixty days designated for compliance, when DCPS did not receive an injunction prior to its appeal to the Superior Court, and that the 120 days for Complainant to file an unfair labor practice complaint lapsed prior to WTU's Complaint. (Answer at 4).

Board Rule 520.4 states: "Unfair labor practice complaints shall be filed not later than 120 days after the date on which the alleged violations occurred." Pursuant to Board Rule 520.4, the Board only has authority to review unfair labor practice allegations that took place during the 120 days preceding the filing an unfair labor practice complaint. The Board has held that Rule 520.4 is jurisdictional and mandatory. *Hoggard v. D.C. Public Schools and AFSCME Council 20, Local 1959,* 43 D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1993), *aff'd sub nom., Hoggard v. Public Employee Relations Board,* MPA-93-33 (D.C. Super. Ct. 1994), *aff'd,* 655 A.2d. 320 (D.C. 1995); *see also Public Employee Relations Board v. D.C. Metropolitan Police Department,* 593 A.2d 641 (D.C. 1991). The Board does not have discretion to extend the deadline for initiating an action. *Hoggard,* Slip Op. No. 352.

DCPS relies on *Pitt v. D.C. Dep't of Corrections,* 59 D.C. Reg. 5554, Slip Op. No. 998, PERB Case No. 09-U-06 (2009), for its timeliness argument. In *Pitt,* the petitioner received a denial by the respondent of representation in an arbitration matter, and alleged that the respondent failed to arbitrate his case. The *Pitt* Board found that the time to file against the respondent for its denial commenced on the date of the denial of representation. *Id.* The Board's

statement that "the time for filing a Complaint commences 120 days after the date Petitioner admits he actually became aware of the event giving rise to the Complaint allegations" falls within the Board's precedent of "when Complainant knew or should have known of the acts giving rise to the violation." *Id.* at 8. The petitioner was denied representation by the respondent, and consequently, *knew* of the acts giving rise to the violation. *Id.* The Board's statement that "the Petitioner admits he actually became aware of the event" refers to the petitioner receiving the denial from the respondent for representation, and did not create a second standard for computing the Board's 120 day deadline. *Id.* Therefore, the Board rejects DCPS's argument that the Board has two standards for computing the 120 day deadline.

In its Motion to Dismiss, DCPS argues that the Board has two standards for computing the 120-day deadline for Board Rule 520.4. (Motion to Dismiss at 3). DCPS asserts that the Board's holds that the deadline is triggered (1) " when the Complainant knew or should have known of the acts giving rise to the violation," or (2) "the date the Petitioner admits he actually became aware of the event giving rise to the Complaint allegations." *Id.* DCPS relies upon *Pitt* for its assertion. The Board did not create two standards in *Pitt*. DCPS's assertion that "the date the Petitioner admits he actually became aware of the event giving rise to the Complaint allegations" is a second standard improperly draws the quotation from the larger context of the Board's Decision. The possible existence of two standards, which this Board rejects, does not affect the outcome in this case.

In *Pitt*, there was a specific event, i.e. the respondent's denial of representation, that gave rise to the petitioner's complaint. *Id.* In the present case, the Union was not presented with a denial of the Agency's compliance. The Union has submitted evidence that the Agency intended to comply with the Award, and was in the process of compliance at the time WTU filed its Complaint. (Motion on Pleadings, Exhibit 2). The Board's computation of the 120-day deadline starts "when the Complainant knew or should have known of the acts giving rise to the violation." *Pitt*, Slip Op. No. 998, at p. 8. (citing *Jackson and Brown v. American Federation of Government Employees, Local 2741*, 48 D.C. Reg. 10959, Slip Op. 414 at p. 3, PERB Case No. 95-S-01 (1995)). The Agency does not dispute that it has not finished complying with the Arbitrator's award. The Parties dispute when the WTU knew or should have known that DCPS would not fully comply. Whether the Complaint was timely filed depends upon when Complainant knew or should have known of the acts giving rise to the violation. *See Pitt*, Slip Op. No. 998, at p. 8. The Board finds that all of the foregoing constitutes an issue of fact that cannot be resolved on the pleadings alone. The Board denies DCPS's Motion to Dismiss.

As there is an issue of fact that is necessary for the Board to determine its jurisdiction, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations, pursuant to PERB Rule 520.9. *See 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 at p. 9-10, PERB Case No. 09-U-52 (2009).

B. Motion to Dismiss for Failure to State a Claim

While a Complainant need not prove its case on the pleadings, it must plead or assert allegations that, if proven, would establish the alleged statutory violations made in the complaint. *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); and *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994). "The validation, i.e. proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO*, 48 D.C. Reg. 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

When considering a motion to dismiss for failure to state a cause of action, the Board considers whether the alleged conduct may constitute a violation of the CMPA. *See Doctors' Council of District of Columbia General Hospital v. District of Columbia General Hospital*, 49 D.C. Reg. 1137, Slip Op. No. 437, PERB Case No. 95-U-10 (1995). 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. District of Columbia Office of the Deputy Mayor for 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).

Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." the Board has determined that "[t]o maintain a cause of action, [a] Complainant must [allege] the existence of some evidence that, if proven, would tie the Respondent's actions to the asserted [statutory violation]. Without the existence of such evidence, [a] 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*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

DCPS asserts that "none of the allegations in the Complaint constitutes a violation of the Comprehensive Merit Personnel Act as DCPS has substantially complied with the arbitrator's award." (Motion to Dismiss at 7). The Board has held that an Agency's refusal or failure to implement an award where there is no dispute over the award terms constitutes a refusal to bargain in good faith, violating the CMPA. *American Federation of State County and Municipal Employees, District Council 20, et al., AFL-CIO v. District of Columbia Public Schools, et. al.*, 59 D.C. Reg. 3258, Slip Op. No. 796 at p. 4, PERB Case No. 05-U-06 (2005); *American Federation of Government Employees, Local 872, AFL-CIO v. D.C. Water and Sewer Authority*, 46 D.C. Reg. 4398, Slip Op. No. 497 at p. 3, PERB Case No. 96-U-23 (1996).

In the present case, WTU's Complaint alleges that DCPS has not complied with the Award, and these allegations, if proven, would establish violations of the CMPA. (Amended

Complaint at 2). The Parties dispute DCPS's actions to comply with the Award. Establishing the existence of the alleged unfair labor practice violations requires an evaluation of the evidence and credibility determinations about conflicting allegations. Specifically, the issue of whether the Respondent's actions rise to the level of violations of the CMPA is a matter best determined after the establishment of a factual record, through an unfair labor practice hearing. *See 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 at p. 9-10, PERB Case No. 09-U-52 (2009). Therefore, the Respondent's Motion to Dismiss is denied.

C. Motion for an Order Based on the Pleadings

WTU filed a Motion for an Order Based on the Pleadings, asserting that DCPS's Answer "admits that it failed to comply fully with the award." (Motion on Pleadings at 1). It is undisputed that the Award states, "DCPS shall make a 60-day good faith effort to locate terminated teachers." (Amended Complaint at 1, Answer at 2). In order to determine whether DCPS has committed an unfair labor practice, it must be determined whether DCPS has made a good faith effort to comply with the Arbitrator's award and whether its noncompliance fully with the Award was unreasonable or intentional at the time the Complaint was filed. This presents an issue of fact that cannot be resolved based on the pleadings alone. Therefore, the Board denies WTU's Motion for an Order Based on the Pleadings. As there is an issue of fact, pursuant to PERB Rule 520.9, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. *See 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 at p. 9-10, PERB Case No. 09-U-52 (2009).

## IV. Conclusion

The Board has found that material issues of fact are in dispute. Therefore, a factual record must be developed in order to determine the Board's jurisdiction, regarding timeliness of the Complaint's filing, which is in dispute by the Parties. In addition, the Parties dispute whether DCPS has complied with the Award.

The Board finds that all of the foregoing constitutes an issue of fact that cannot be resolved on the pleadings alone. Therefore, pursuant to PERB Rule 520.9, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. See *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 at p. 9-10, PERB Case No. 09-U-52 (2009).

## ORDER

**IT IS HEREBY ORDERED THAT:**

1. DCPS's Motion to Dismiss is denied.
2. WTU's Motion for an Order Based on the Pleadings is denied.
3. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and present 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**
Washington, D.C.

January 23, 2014

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 14-U-02 was transmitted via File & ServeXpress to the following Parties on the 18th of February, 2014.

Anton G. Hajjar **via File&ServeXpress**
1300 L Street, NW, Suite 1200
Washington, DC 20005
(202) 898-1707/ Fax (202) 682-9276
ahajjar@odsalaw.com

Kaitlyn A. Girard **via File&ServeXpress**
Michael D. Levy
D.C. Office of Labor Relations and Collective Bargaining
441 4th Street, N.W., Suite 820 North
Washington, D.C. 20001

Erica J. Balkum
Public Employee Relations Board
1100 4th Street, S.W.
Suite E630
Washington, D.C. 20024
Telephone: (202) 727-1822
Facsimile: (202) 727-9116