

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

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

<hr/> In the Matter of:)	
)	
Fraternal Order of Police/ Department of Youth Rehabilitation Services Labor Committee)	
Complainant,)	PERB Case No. 14-U-09
)	
v.)	Opinion No. 1570
)	
District of Columbia Department of Youth Rehabilitation Services)	
)	
Respondent.)	
)	
<hr/>)	

DECISION AND ORDER

On February 11, 2011, Fraternal Order of Police/Department of Youth Rehabilitation Services Labor Committee (“FOP” or “Complainant”) filed an unfair labor practice complaint (“Complaint”) alleging that the District of Columbia Department of Youth Rehabilitation Services (“Respondent” or “DYRS”) violated D.C. Official Code §§ 1-617.04(a)(1) and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by failing to comply with the Union’s requests for information.

In its response, DYRS moved to dismiss the complaint. A hearing was held before Hearing Examiner Sean J. Rogers on March 25, 2015. Post-hearing briefs were filed by both parties. No exceptions to the Hearing Examiner’s Report and Recommendation were filed by either party. For reasons stated herein, the Board adopts the Hearing Examiner’s Report and Recommendation that the Respondent committed unfair labor practices (ULP).

I. Statement of the Case

On January 8, 2014, a letter signed on behalf of Neil A. Stanley, DYRS Director, advised FOP Chairperson Takisha Brown that FOP’s December 24, 2013 career ladder grievance was being denied. The letter asserted that DYRS had entered into a 2006 Memorandum of Understanding (“2006 MOU”) with FOP that ended career ladder promotions. Specifically, the letter stated:

“In 2006, DYRS management and the Union, through Impact and Effect bargaining, entered an agreement ending career ladder

promotions. Through these bargaining sessions, both parties agreed that anyone hired prior to 10/1/2005, who successfully completed the required trainings, and who had received no discipline within the past year received promotions on 4/17/2007. After that date, career ladder promotions were discontinued. This is reflected in all Youth Development Representative position descriptions. I've attached a copy of a position description which states that the position of Youth Development Representative does not offer promotional potential for your review."¹

As a result of the above letter, on January 13, 2014, Brown sent an email with two letter attachments to Adam Aljoburi, DYRS Labor Liaison and to Dean Aqui, Acting Director, DC Office of Labor Relations and Collective Bargaining requesting:

(RFI #1) – “a copy of the Impact and Effect notations, documents and signed agreements with all bargaining parties since the agency is using this to valid [sic] the reasoning for denial for grade promotions.”²

(RFI #2) – “for all FOP bargaining unit members ...

1. “Updated listing providing all FOP union members listed in alphabetical order within the bargaining union to include part time employees. I would like the following information listed by names, job titles, grade, date of employment, job status, and date of NTE for temporary/term employees and CBU codes.”³
2. “Copies of the actual Performance Improvement Plan form in the event a FOP member may be subject to receive. Preferably the language within the document [sic].
3. “Listing of all employees who were reassigned to various work sites YSC, Abscondence Unit and New Beginning's [sic] etc.
4. “Listing of all staff on administrative leave, pending corrective, terminations, adverse actions, worker's compensation and light duty.
5. “Listing of all part time employees,”⁴

On January 28, 2014, FOP Vice President Yeetta Ward followed up with Aljoburi and Aqui, enclosing a copy of RFI #1 and RFI #2. The Hearing Examiner found that DYRS did not respond

¹ FOP Exhibit 1, January 8, 2014 letter, p. 1.

² FOP Exhibit 1, January 13, 2014 memo to Adam Aljoburi.

³ NTE is the acronym for “Not to Exceed” and identifies term employees whose employment ends on a date certain. CBU is the acronym for “Collective Bargaining Unit” and identifies an employee's bargaining unit status.

⁴ FOP Exhibit 1, January 13, 2014 letter to Mr. Aljoburi.

at all to RFI #1 and RFI #2 until after FOP's February 11, 2014 ULP complaint in the instant case, and then only with a limited listing of bargaining unit employees without work locations.⁵

The record reveals that on January 15, 2014, Andre Phillips, FOP Executive Chief Shop Steward, emailed Aljoburi two additional attachments that were new requests for information (RFI #3 and RFI #4).⁶ RFI #3 is titled "Request for All Information Regarding Safety as it Effects Staff From The result of Residents" and requested the following information to assist FOP in policing collective bargaining:

(RFI #3) – "youth on youth assaults, youth on staff assaults, riots, attempted or successful escapes, contraband ect. [sic] In addition to any sanctions resulting from 412 rule violations in connection to any of these disciplinary issues.⁷ We also are requesting all information provided to MPD in pertaining to any criminal charges as a result of youth assaulting staff, including but not limited to the hospitalization of staff."

RFI #4 is titled "Information Request for Tardiness and Observed Patterns of Alleged Leave Abuse by Union Members" and requested the following information to assist FOP in policing collective bargaining:

(RFI #4) –

1. "Violations of tardiness records for all bargaining-unit employees over the past (90) days and continue to provide information regularly as it's generated.
2. "Names of union members that are allegedly deemed violators of abuse of leave for the past (90) days and continue to provide information regularly as it's generated.
3. "Names of all employees disciplined or discharged for tardiness and leave abuse, dates and descriptions of each discipline, and each amount of tardiness and excessive leave that lead [sic] to discipline for the past (90) days. In each case, please attach a copy of the discipline letter provided to the employee. Also indicate any adjustments in discipline that occurred in the course of any grievance procedure, and attach copies of any settlements.
4. "All personnel manuals, notices or other documents that is set forth and the agencies tardiness and abuse of leave policies."

⁵ R&R at 4.

⁶ R&R at 4 and 5, and FOP Exhibit 2, two letter/memos dated 1/14/14.

⁷ The record establishes that 412 rule violations, also known as Rule 412 violations or 412 violations or violations of Code 412, involve staff violations of the consent decree governing the treatment of detained youth, also known as the Jerry M. Decree. (Tr 86-87). See also: <http://dhrs.dc.gov/page/consent-decree> and Consent Decree, Jerry M., et al. v. District of Columbia et al, CA No. 1519-85 (IFP), July 24, 1986.

RFI #3 and RFI #4 concluded with the statement, "Please provide this information by 1/24/14. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept."⁸

On January 27, 2014, Phillips emailed Aljoburi as follow-up to FOP's January 15, 2014 RFI #3 and RFI #4.⁹ On January 28, 2014, Aljoburi responded by email as follows:

"... is there a timeframe you're looking for regarding the safety request?"¹⁰

"Regarding the tardiness request, in addition to DPM, the attached Time, Attendance, and Leave Policy is also utilized. It would be a violation of the employee's privacy rights to provide the answer to the first 3 questions in this request."

On February 11, 2014, FOP filed this ULP Complaint alleging that DYRS violated DC Code §§ 1.617.04(a)(1) and (5) by failing to provide the bargaining information FOP requested. FOP contended that it did not receive responses to its RFIs, except for a copy of DYRS' Time and Attendance Policy.¹¹ DYRS contended that it provided FOP with all the unprivileged information that it could in response to FOPs valid RFIs.¹² At various times between May 14, 2014 and January 16, 2015, DYRS provided FOP with some but still not all of the requested information.

FOP contended that DYRS has an obligation to respond to FOP's RFIs because the requests are relevant to FOP's role as the exclusive representative of bargaining unit employees and are part of DYRS' duty to bargain in good faith with FOP. FOP asserts that DYRS violated D.C. Official Code §§ 1.617.4(a)(1) and (5) by not responding to the RFIs within a reasonable time.

DYRS asserted that under PERB case precedent, it provided all the requested, "unprivileged information" that it could to FOP so the information request was moot. It stated various reasons for why it did not provide the requested information more completely:

1. "Human error."
2. The issue is not ripe until there has been a general request to bargain and a blanket refusal to bargain.
3. The statute of limitations does not begin to run until DYRS refuses to provide the requested information, and DYRS never refused to provide unprivileged information.
4. The duty to provide information is case specific.
5. If the requested information is deemed confidential by DYRS, then DYRS may limit the production of the information.

⁸ FOP Exhibit 2, two letter/memos dated 1/14/14.

⁹ R&R at 5.

¹⁰ There is no evidence on the record that FOP responded to this question before filing the ULP complaint on February 11, 2014.

¹¹ R&R at 5.

¹² R&R at 10.

6. The release of confidential personnel information without the explicit written authorization from each employee would be an unwarranted intrusion into the employee's privacy rights.

II. Hearing Examiner's Recommendation

The Hearing Examiner found that DYRS violated D.C. Official Code §§ 1-617.04(a)(1) and (5) by failing to respond and refusing to provide relevant and necessary information requested by FOP in each of the RFIs.¹³ In the case of each of the four RFIs, the Hearing Examiner concluded the record established that DYRS willfully violated the CMPA. Whether DYRS' general delays to respond to FOP's requests for information were due to negligence or inadvertence or intransigence or "human error," the Hearing Examiner found that DYRS violated the CMPA on numerous occasions.

As regards RFI #1, DYRS' violation was based on its failure to provide or even respond to FOP's bargaining information request or to provide FOP with the 2007 Agreement.¹⁴

Concerning the five-month delay to respond to FOP's RFI #2 the Hearing Examiner found it was unreasonable.¹⁵ The Hearing Examiner addressed DYRS' personal privacy and confidentiality defenses for its refusal to provide requested disciplinary files per RFI #2 ¶4. Most significant among several reasons the Hearing Examiner found that the defense of confidentiality was inappropriate is because confidentiality relates to disclosure to the general public which is unlike this situation of a request from a duly certified exclusive representative of employees.¹⁶

It took DYRS one year to respond to FOP's RFI #3, seeking information concerning assaults, riots, escapes, contraband, 412 rule violations, and criminal charges arising from assaults and staff hospitalization. The Hearing Examiner found that extraordinary delay was unreasonable, in addition to the response being limited and inadequate.¹⁷

In RFI #4, FOP requested information about employees' tardiness records and leave abuse, and personnel manuals, notices or other documents concerning DYRS' tardiness and leave abuse policies. As with RFI #2, the Hearing Examiner found that DYRS' failure and refusal to provide the information requested based on personal privacy grounds was without merit.¹⁸

In response to FOP's request, the Hearing Examiner recommended that DYRS be ordered to pay reasonable costs associated with the ULP's prosecution. He found that the record establishes that DYRS willfully failed and refused to respond within a reasonable time to FOP's

¹³ R&R at 11.

¹⁴ R&R at 15. Further, because DYRS knew that FOP had mistakenly requested a 2006 Agreement, that did not exist, it should have voluntarily provided the 2007 Agreement.

¹⁵ R&R at 19.

¹⁶ R&R at 17-18.

¹⁷ R&R at 20.

¹⁸ R&R at 22.

RFIs and that DYRS engaged in extraordinary delay and extraordinary paucity in the content of the responses DYRS ultimately provided to FOP. Consequently, he reasoned that FOP's request for costs is warranted in the interest of justice.¹⁹

III. Analysis

To establish an unfair labor practice violation under D.C. Official Code §§ 1-617.04 (a)(1) and (5) of the CMPA, the Complainant must prove by a preponderance of evidence that the Respondent interfered with, restrained or coerced an employee in the exercise of rights guaranteed by this subsection, or that the Respondent refused to bargain in good faith with the union.

In a recent decision, the Board held that when confidentiality is raised as a defense, "a union's right to information has always been balanced against confidentiality concerns. The test is whether the information sought is relevant and necessary to the union's legitimate collective bargaining functions and whether this need is outweighed by privacy concerns."²⁰ The Hearing Examiner in the instant case held that the information sought by FOP was relevant and necessary.²¹ It was undisputed that FOP was the certified exclusive representative of the members of the unit. The justification for an employer to not disclose information to the general public is a much higher bar than for the certified union representative.²² Thus, because FOP is the exclusive representative of these employees, FOP was entitled to a positive and timely response to its request for relevant and necessary information to fulfill its responsibilities to the employees in the bargaining unit.²³

In *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department* we held that it is an unfair labor practice for an agency to withhold relevant and necessary information from the Union without a *viable defense*.²⁴ As mentioned earlier, DYRS offered various reasons why it did not comply with FOP's request for this information. As the Hearing Examiner stated throughout his Report and Recommendation, "whether DYRS' delays and failures to respond to the RFI were due to negligence or inadvertence or intransigence or 'human error,' I find that DYRS violated DC [Official] Code §

¹⁹ R&R at 22.

²⁰ *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, Slip Op. No. 1553 at 5, PERB Case Nos. 12-U-05, 12-U-10, and 13-U-28 (October 29, 2015). See also, *D.C. Nurses Ass'n v. Mayor of D.C.*, 445 D.C. Reg. 6736, Slip Op. No. 558 at 5, PERB Case Nos. 95-U-03, 97-U-16, and 97-U-28 (1998); *Univ. of D.C. Faculty Ass'n v Univ. of D.C.*, 36 D.C. Reg. 3333, Slip Op. No. 215 at 3, PERB Case No. 88-U-16(1989), quoted in *F.O.P./Metro. Police Dep't Labor Comm.*, Slip Op. No. 1302 at 22, and *F.O.P./Metro. Police Dep't Labor Comm. V. Metro. Police Dep't.*, Slip Op. No. 1521 at 3.

²¹ R&R at 11.

²² DYRS' general claim to confidentiality as a defense does not apply here because the Union is involved and concerned with issues relating to unit employees and thus is entitled to receive information from an employer that would be withheld from the general public because of a claim of confidentiality. See *Westinghouse Electric Corporation*, 239 NLRB 106 at 113-114.

²³ *AFGE, Local 631 v. District of Columbia Water and Sewer Authority*, 59 DC Reg. 3948(2012), Slip Op. No. 924, PERB Case No. 08-U-04 (2007).

²⁴ 59 D.C. Reg. 3386, Slip Op. No. 835 at 9-10, PERB Case No. 06-U-10 (2006).

1-617.04(a)(1) and (5) by failing to provide all the information requested ... within a reasonable time.”²⁵ We agree, for the reasons stated above and in the cases cited in footnote 20.

While agreeing with the Hearing Examiner’s conclusion that DYRS committed a ULP by not providing the requested information to FOP, the Board disagrees that there was an unfair labor practice committed regarding FOP’s request in RFI #4 1 & 2 that DYRS should “continue to provide information regularly as it’s generated,” concerning violations of tardiness rules and abuse of the leave policy. In essence, FOP is asking that DYRS be ordered to provide information that does not exist. Respondent is only obligated to provide information it possesses. We agree with the reasoning of the Federal Labor Relations Authority in *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol*, that, “It is not an unfair labor practice to fail to produce documents that do not exist.”²⁶ The Board concludes that, except as stated above, the Hearing Examiner’s findings and conclusions are reasonable, supported by the record, and consistent with Board precedents. FOP requested information to represent its unit members, the Hearing Examiner found the requested information was relevant and necessary,²⁷ and DYRS did not provide the requested information. Without any viable defense for denying the information, DYRS violated D. C. Official Code § 1-617.04(a)(1) and (5) of the CMPA.²⁸

IV. Remedy

FOP asked the Board to order DYRS to: 1) cease and desist from violating the CMPA in the manner alleged or in any like or related manner; 2) provide FOP with all requested information; 3) post appropriate notices to employees; and, 4) pay all costs associated with FOP’s prosecution of this charge.²⁹

The Board finds it reasonable to order DYRS to cease and desist from violating the CMPA in the manner alleged or in any like or related manner. We also find it reasonable to order DYRS to immediately deliver to FOP any and all information requested by FOP in RFIs 1-4 dated January 13 and January 15, 2014,³⁰ with the exception that the Board is ordering in RFI #4 1 & 2 that DYRS is not required to “continue to provide information regularly as it’s generated,” but only to the date of this order. In addition, the Board orders DYRS to post a notice acknowledging its violation of the CMPA, as detailed herein.

²⁵ R&R at 22.

²⁶ 23 FLRA 239, 240 (1986, citing *Army and Air Force Exchange Service (AAFES), Lowry Air Force Base Exchange, Ft. Carson, Colorado*, 13 FLRA 392, 399 (1983).

²⁷ R&R at 21-23.

²⁸ *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Labor Committee*, 60 DC Reg. 5337 (2013), Slip Op. No. 1374, PERB Case No. 06-U-41 at 17-18, (March 14, 2013)

²⁹ Complaint at 5-6.

³⁰ *AFGE, Local 2725 v. D.C. Dep’t of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 5, PERB Case 09-U-65. (2012)

FOP further requested that DYRS be ordered to pay “all costs associated with the Union’s prosecution of this charge.”³¹ D.C. Official Code § 1-617.13(d) authorizes the Board “to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine.”

The circumstances under which the Board awards costs were articulated in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*,³² in which the Board stated:

[A]ny such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are “reasonable” that may be ordered reimbursed . . . Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued . . . What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative.

In the instant matter, the Board found that DYRS failed and refused, without a viable defense, to produce the information that FOP requested that was “necessary for the Union to perform its duties as exclusive bargaining representative.”³³ Despite DYRS’s having the information, it withheld the information from FOP. The Board found that in so doing, DYRS failed to meet its statutory duty to bargain in good faith, that its defenses were wholly without merit, and that its actions reasonably and foreseeably undermined FOP’s ability to fulfill its duties on behalf of the bargaining unit employees. In light of these findings, the Board finds that the award of costs in accordance with FOP’s request would serve the “interest-of-justice” test articulated in *AFSCME, supra*.

V. Conclusion

We conclude that DYRS did violate D.C. Official Code §§ 1-617.04 (a)(1) and (5) of the Comprehensive Merit Personnel Act. The unfair labor practice complaint is upheld.

³¹ Complaint at 6.

³² 37 D.C. Reg. 5658, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02 (1990).

³³ Complaint at 5.

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's unfair labor practice complaint is upheld.
2. The District of Columbia Department of Youth Rehabilitation Services shall deliver to the Fraternal Order of Police/ Department of Youth Rehabilitation Services Labor Committee, within fourteen (14) days of the date of the issuance of this Order, the information FOP requested, except as noted above.
3. The District of Columbia Department of Youth Rehabilitation Services shall conspicuously post where notices to employees are normally posted a notice that the Board will furnish to DYRS. The notice shall be posted within fourteen (14) days from DYRS's receipt of the notice and shall remain posted for thirty (30) consecutive days.
4. Within fourteen (14) days from the date of the receipt of the notice, DYRS shall notify the Public Employee Relations Board in writing that the attached notice has been posted accordingly.
5. Upon request, DYRS shall reimburse FOP for its reasonable costs associated with PERB Case No. 14-U-09.
6. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Chairman Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

March 17, 2016

Washington, DC

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-U-09, Opinion No. 1570, was served by File & ServXpress on the following parties on this the 9th day of May, 2016.

Brenda C. Zwack, Esq.
Murphy Anderson, PLLC
1401 K Street, NW, Suite 300
Washington, DC 20005

Andrew L. Gerst, Esq.
Attorney Advisor
Office of Labor Relations and Collective Bargaining
441 4th Street, NW, Suite 820 North 4126
Washington, DC 20001

/s/ Sheryl Harrington _____

PERB



Public
Employee
Relations
Board



1100 4th Street S.W.
Suite E630
Washington, D.C. 20024
Business: (202) 727-1822
Fax: (202) 727-9116
Email: perb@dc.gov

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF YOUTH REHABILITATION SERVICES, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1570, PERB CASE NO. 14-U-09 (March 17, 2016).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law in the manners alleged in PERB Case No. 14-U-09, and has ordered DYRS to post this Notice.

WE WILL cease and desist from violating D.C. Official Code §§ 1-617.04(a)(1) and (5) in the manners stated in Slip Opinion No. 1570, including not bargaining in good faith by refusing or failing to provide relevant and necessary information that is requested by the exclusive representative, the Fraternal Order of Police/Department of Youth Rehabilitation Services Labor Committee.

Department of Youth Rehabilitation Services

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or DYRS's compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board by U.S. Mail at 1100 4th Street, SW, Suite E630; Washington, D.C. 20024, or by phone at (202) 727-1822. **BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of Chairman Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

March 17, 2016