Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
District of Columbia Water and Sewer Authority,	
	PERB Case No. 08-U-01
Complainant,	Opinion No. 922
v.	Motion for Preliminary Relief
American Federation of Government Employees, Local 872,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

The District of Columbia Water and Sewer Authority ("WASA" or "Authority") filed a document styled "Unfair Labor Practice Complaint and Motion for Preliminary Relief" against the American Federation of Government Employees, Local 872 ("AFGE, Local 872", "Respondent" or "Union"). WASA asserts that AFGE, Local 872 has violated the Comprehensive Merit Personnel Act ("CMPA") by: (a) purposefully repudiating the working conditions agreement between WASA and AFGE, Local 872; and (b) refusing to bargain in good faith regarding their unilateral repudiation. (See WASA's Submission at p. 4). WASA claims that the Union's conduct violates the CMPA, as codified under D.C. Code §1-617.04 (b) (1) and (3). In addition, WASA contends that the ongoing violations of the CMPA are clear-cut, flagrant and impact both WASA and its employees in a widespread and significantly harmful manner, and therefore preliminary relief is appropriate. (See WASA's Submission at pgs 4-5). WASA requests that the Board: (1) grant its request for preliminary relief; (2) order the Union to cease and desist from violating the CMPA; (3) order the Union to withdraw its request for arbitration regarding the Christopher Hawthorne termination; and (4) order the Union to pay WASA's reasonable costs incurred in bringing this action. (See WASA's Submission at pgs. 5-6).

AFGE, Local 872 filed an opposition to WASA's request for preliminary relief and an answer to the unfair labor practice complaint denying that they have violated the CMPA. As a result, AFGE,

Local 872 has requested that the Board dismiss WASA's Motion for Preliminary Relief ("Motion"). WASA's Motion and AFGE, Local 872's opposition are before the Board for disposition.

II. Discussion

"The Authority was established in 1996 as an independent agency of the District of Columbia Government. The Authority's purpose is to provide water distribution services and sewage collection, treatment and disposal for the District of Columbia and portions of the Washington metropolitan area. The Authority and the Union are parties to a collective bargaining agreement on Working Conditions ("Agreement").[1] This agreement includes Article 58, 'General Grievance and Arbitration Procedures'." (WASA's Submission at p. 2).

Pursuant to Article 58 of the parties' Agreement, WASA and the Union rely on the Federal Mediation and Conciliation Service ("FMCS") to provide arbitrators to hear general grievance disputes. Specifically, Article 58, Section D (1) provides that "[w]ithin seven (7) workdays from [WASA's] receipt of the request from the Local Union to arbitrate, the Local Union shall request the Federal Mediation and Conciliation Service to refer a panel of seven (7) impartial arbitrators. In addition, Article 58, Section D (1). . . provides 'all time limits shall be strictly observed unless the parties mutually agree in writing to extend the time limits'." (WASA's Submission at p. 3).

"On November 14, 2005 the Union notified the Authority of its intent to invoke arbitration" on behalf of Christopher Hawthorne. (WASA's Submission at p. 3). The Union was seeking to have Mr. Hawthorne's termination rescinded. WASA claims that the "Union also sent copies of this notice to Dwight Bowman, AFGE NVP-District 14, John Gage, National President, AFGE, and Andrea Brooks, NVP-Fair Practices and Women's Fair Practices, AFGE. Therefore, the National Office of AFGE knew or should have known on or about November 14, 2005 that the Union had decided to arbitrate this case." (WASA's Submission at p. 3).

"On or about December 5, 2005 [WASA] contacted FMCS and ascertained that the Union had failed to request an arbitration panel for the Hawthorne Termination. It notified the Union President, Christopher Hawthorne, via letter on December 8, 2005. . . that because the Union failed to request a panel of arbitrators within the contractual time limit, [WASA] was considering the matter closed. Neither Mr. Hawthorne nor anyone from either the local or national Union contacted [WASA] regarding this matter after the Union's November 14, 2005 letter." (WASA's Submission at pgs. 3-4).

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[1] "The parties signed a Memorandum of Understanding in July 2006, the purpose of which was to carry over the Working Conditions provisions formerly entitled 'Master Agreement on Compensation and Working Conditions' into an individual agreement with AFGE, Local 872 with an expiration date of September 30, 2007." (WASA's Submission at p. 2, n. 1).

WASA contends that "[a]t no time, did [WASA] and the Union agree, either verbally or in writing, to extend or toll the time lines regarding the Hawthorne termination." (WASA's Submission at p. 4).

WASA claims that "[o]n September 4, 2007, more than 400 work days after the contractually permitted time frame, Sarah Starrett, on behalf of [AFGE, Local 872], requested an arbitration panel from FMCS in order to appeal the Hawthorn termination. Therefore, [WASA contends that AFGE, Local 872] has purposefully repudiated the Agreement and has refused to bargain in good faith regarding their unilateral repudiation." (WASA's Submission at p. 4).

WASA asserts that AFGE Local 872 "has repudiated other parts of the Agreement in the past. Specifically, on May 25, 2007, Hearing Examiner Sean Rogers recommended that the Authority's Unfair Labor Practice Complaint be upheld against the Respondent for unilaterally repudiating the "losing party pays" provision of the Expedited Grievance Procedure in the Agreement. The Union has chosen to repeat this behavior less than four months after receiving Mr. Rogers' recommendations." (WASA's Submission at p. 4).

WASA claims that AFGE, Local 872's ongoing violations of the CMPA are clear-cut and flagrant. (See WASA's Submission at p. 4). In addition, WASA contends that the "effect of the Respondent's violations will be widespread. . . [because it] maintains Agreements with four (4) other Unions that have the identical terms that the Respondent has repudiated" and potentially these other four Unions can follow AFGE, Local 872's lead by repudiating their respective Agreements. (WASA's Submission at p. 5). Therefore, WASA asserts that preliminary relief is appropriate in this case.

In its response, AFGE, Local 872 asserts that some of WASA's claims are speculative and that WASA does not posses substantial evidence to support its claims. (See AFGE, Local 872's Opposition to WASA's Motion at p. 3).

In addition, AFGE, Local 872 claims that the allegations do not concern statutory violations, but involve violations of the parties' collective bargaining agreement. (See AFGE, Local 872's Opposition to WASA's Motion at pgs. 3-5). Therefore, AFGE, Local 872 asserts that the Board lacks jurisdiction in this case. AFGE, Local 872 also contends that WASA has failed to satisfy the statutory requirements for preliminary relief. In support of this claim, AFGE, Local 872 asserts that WASA has not shown, by affidavits or other evidence, that a flagrant and clear-cut unfair labor practice has occurred; or that the effect of the alleged unfair labor practice is widespread; or that the public interest is seriously affected; or that the Board's processes are being interfered with; and that the Board's ultimate remedy may be clearly inadequate. (See AFGE, Local 872's Opposition to

WASA's Motion at p. 3).

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are 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, this 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 the Board [has] determined that this standard for exercising its discretion has been met, the bases 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).

It is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. Furthermore, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met. In cases such as this, the Board has found that preliminary relief is not appropriate. See, *DCNA v. D.C. Health and Hospitals Public Benefit Corporation*, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Even if the allegations are ultimately found to be valid, it does not appear that any of AFGE, Local 872's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. AFGE, Local 872's actions presumably affect WASA and its employees. However, AFGE, Local 872's actions do not appear to be part of

a pattern of repeated and potentially illegal acts. While the CMPA prohibits labor organizations, its agents and representatives from engaging in unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, WASA has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

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. Specifically, 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 prejudice to WASA following a full hearing. In view of the above, we deny WASA's Motion for Preliminary Relief.

For the reasons discussed above, the Board: (1) denies WASA's request for preliminary relief; and (2) directs the development of a factual record through an unfair labor practice hearing.

ORDER[2]

IT IS HEREBY ORDERED THAT:

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

(2) The Board's Executive Director shall: (a) schedule a hearing; and (b) refer WASA's unfair labor practice complaint to a Hearing Examiner.

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

(4) 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.

September 8, 2009

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[2]This Decision and Order implements the decision reached by the Board on November 15, 2007 and ratified on July 13, 2009.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-01 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of September 2009.

Stephen Cook
Labor Relations Manager
D.C. Water and Sewer Authority
5000 Overlook, Avenue, S.W.
3rd Floor
Washington, D.C. 20032

FAX & U.S. MAIL

Jonathan Shanks, President
AFGE, Local 872
Office of Labor Relations &
1016 Urell Place, N.E.
Washington, D.C. 20017

FAX & U.S. MAIL

Deborah Leahy, Esq.
Labor Relations Specialist
District of Columbia Water and Sewer Authority
5000 Overlook, Avenue, S.W.
Washington, D.C. 20032

FAX & U.S. MAIL

Nate Nelson
National Representative
14th District, AFGE
80th F Street, N.W.
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Christopher Hawthorne
1922 Valley Terrace, S.E.
Washington, D.C. 20032

U.S. MAIL

Sheryl V. Harrington
Secretary