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,AFL-CIO, Locals 2091, 2401, 2776, 2743, 1808, 877, 709, 2092, 2087, and 1200, and American Federation of Government Employees, Council 211, AFL-CIO, Locals 2725, 1975, 3721, 2978, 383, 1000, 2087, 631, and 2741, and SEIU/NAGE Locals R3-05 and R3-07, and Fraternal Order of Police District of Columbia Lodge #1 Department of Corrections Labor Committee, D.C. Department of Youth Rehabilitative Services Labor Committee, D.C. Protective Services Division Labor Committee, and LIUNA, PSE-572 Baltimore/Washington Laborers' D.C., Complainants, v. District of Columbia Government, Respondent.	PERB Case No. 10-U-53 Opinion No. 1292

DECISION AND ORDER

I. Statement of the Case:

The following bargaining unit representatives collectively filed an unfair labor practice complaint ("Complaint") against the District of Columbia Government ("the District"): American Federation of State, County and Municipal Employees, District Council 20, Locals 2091, 2401, 2776, 2743, 1808, 877, 709, 2092, 2087, and 1200; American Federation of Government Employees, Council 211, Locals 2725, 1975, 3721, 2978, 383, 1000, 2087, 631, and 2741; SEIU/NAGE Locals NAGE R3-05 and R3-07; Fraternal Order of Police, Lodge No. 1, Department of Corrections Labor Committee, D.C. Department of Youth Rehabilitative Services Labor Committee, D.C. Protective Services Labor Committee; and Laborers International Union of North America ("LIUNA"), PSE 572 ("Complainants" or "the Unions"). Additionally, the Unions request preliminary relief.[1]

Specifically, the Complainants allege that Respondent violated D.C. Code §§ 1-617.04(a)(1) and (5)[2] of the Comprehensive Merit Protection Act ("CMPA") by interfering with, restraining and coercing employees in the exercise of their rights and refusing to bargain in good faith with the Unions. (Complaint at 3).

The Respondent filed an Answer to the Unfair Labor Practice Complaint ("Answer"), denying any violation of the CMPA. Additionally, the Respondent asks that the Complaint be dismissed for lack of merit. (Answer at 3). The parties' pleadings are before the Board for disposition.

II. Discussion

The Unions assert that they "are the exclusive collective bargaining agents of employees of the District represented by the Unions in Compensation Units 1 and 2." (Complaint at 2). In

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[1] The Unions' Complaint incorporates a request for preliminary relief. Specifically, it requests that the Board "[o]rder preliminary relief as provided under Section 520.15 of the Board's rules and regulations, and . . . Seek temporary relief or a restraining order from the Superior Court of the District of Columbia in accordance with D.C. Code § 1-617.13(b) requiring the District [to] bargain in good faith with the Union for a successor collective bargaining agreement." (Complaint at 3). No separate pleading was filed.

[2] D.C. Code § 1-617.04 provides, in part that:

> (a) The District, its agents, and representatives are prohibited from:
>
> (1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;
>
> . . .
>
> (5) Refusing to bargain collectively in good faith with the exclusive representative.

addition, the Unions maintain that "[t]he District and the Unions which represent employees in Compensation Units 1 and 2 reached a tentative agreement on a successor collective bargaining agreement on or about July 26, 2010." (Complaint at 2).

The basis for the Unions' Complaint is as follows:

> Negotiators for the District knew or should have known that the District intended to freeze step increases for the entire Fiscal Year 2011 prior to reaching [a] tentative agreement on a successor collective bargaining agreement yet failed to disclose this to the Unions. The Unions representing employees in Compensation Units 1 and 2 were justified in believing that step increases would continue to be a part of the compensation of employees when they agreed to the tentative collective bargaining agreement. Negotiators for the District were or should have been aware during negotiations that the elimination of step increases would substantially lower the economic value of the tentative agreement to employees represented by the unions which participated in Compensation Unit 1 and 2 negotiations. By the conduct described above, the District is interfering with, restraining and coercing employees in the exercise of their rights and refusing to bargain in good faith, in violation of D.C. Code §§ 1-617.04(a)(1) and (5).

(Complaint at 2-3).

Based on the foregoing, the Unions request that the Board make a finding that the District has violated the CMPA and:

> [o]rder the District and its officers, agents, servants, employees, and attorneys, and those in active concert or participation with them who receive actual notice of the order, to cease and desist from violations of D.C. Code §§ 1-617.04(a)(1) and (5) in the manner alleged or in any other manner; and, affirmatively, immediately meet and bargain in good faith with the Unions representing employees in Compensation Units 1 and 2, including meeting and negotiating in good faith over compensation which would substantially compensate employees for the loss of step increases; require any compensation agreement to be retroactive; make the Unions whole for all losses caused by the District's unfair labor practices; pay attorneys' fees and costs; post an appropriate notice to employees; and desist from or take such affirmative action as effectuates the policies and purposes of the [CMPA].

(Complaint at 3-4).

In its Answer, the Respondent denies the Unions' allegations and asserts affirmative defenses. (Answer at 1-2). Specifically, the Respondent maintains that:

1. Complainants knew or should have known that Respondent intended to freeze step increases for FY 2011 since it was part of the District's Budget.

2. The Budget was submitted to the President of the United States on June 29, 2010.

3. In addition, the Respondent states that "[t]he tentative agreement was not reached until July 26, 2010.

4. Respondent was justified in assuming that Complainants were aware of the District's intent to freeze step increases for FY 2011 since it was part of the public budget proposal.

5. Respondent was under no obligation to provide Complainants with information they did not request and information that was in the public domain.

6. Once Congress approves the Budget, including the step increases, all parties are bound by such an approval since Congress has plenary legislative authority over the District of Columbia. *See James M. Banner, et al.,* v. *United States of America,* 428 F. 3d 303 (D.C. Cir. 2005).

(Answer at 2).

Additionally, the Respondent requests that "the Board should delay taking action on this matter until Congress acts on the District's FY 2011 budget." (Answer at 2). Furthermore, the Respondent asks that the Board dismiss the Complaint as lacking merit. (Answer at 3).

A. Request to Dismiss

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. *See 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 result in 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. 9l-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." Moreover, 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).

In the present case, the Unions pled allegations that the Respondent's actions, specifically those actions concerning the Respondent's bargaining with the Unions, if proven, would establish violations of the CMPA. On the record before us, it is clear that the parties disagree with respect to material facts of this case. 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.

Therefore, the Respondent's request for dismissal is denied, and the Board will continue to process the allegations against the Respondent through an unfair labor practice hearing.

B. Request for Preliminary Relief

The criteria the Board employs for granting preliminary relief in unfair labor practice cases are prescribed under Board Rule 520.15, which provides in pertinent part:

> 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.

In addition, a review of the parties' pleadings reveals that the parties disagree on the facts in this case. Establishing the existence of the alleged unfair labor practice violations turns on making credibility determinations on the basis of these conflicting allegations. We decline to do

so based upon these pleadings alone. The Board has found that preliminary relief is not appropriate in cases similar to this one. *See DCNA v. D.C. Health and Hospital Public Benefit Corporations*, 45 D.C. Reg. 6067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

Moreover, 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 D.C. Reg. 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 (D.C. 1971). *AFSCME D.C. Council 20, et al., v. D.C. Gov't, et al.*, 42 D.C. Reg. 3430, Slip Op. No. 330 at p. 4, PERB Case No. 92-U-24 (1992). In *Automobile Workers*, 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. *Automobile Workers*, 449 F.2d at 1051. 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.* "In those instances where [the Board] 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, Shirley Simmons, Hazel Lee and Joseph Ott v. Fraternal Order of Police/Department of Corrections Labor Committee, et al.*, 45 D.C. Reg. 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In the present case, the Complainants have not met the criteria of Board Rule 520.15. Even if the allegations are ultimately found to be valid, they do not establish that any of the District's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. While the CMPA prohibits the employees, labor organizations, their agents, or 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 compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Complainants have 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.

We conclude that the Complainants have 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 the Respondent following an evidentiary hearing. In view of the above, we deny the Complainants' motion for preliminary relief.

Therefore, we: (1) deny the Respondent's request to dismiss; (2) deny the Complainants' request for preliminary relief and a temporary restraining order; and (3) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainants' request for preliminary relief is denied.

2. The Respondent's request to dismiss is denied.

3. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner.

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.

July 9, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 10-U-53 was transmitted via U.S. Mail and e-mail to the following parties on this the 9th day of July, 2012.

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