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

In the Matter of:)	
)	
American Federation of Government, Employees, Local 2978,)	
)	
Complainant,)	PERB Case No. 04-U-27
)	Opinion No. 771
v.)	
)	Motion for Preliminary Relief
District of Columbia Department of Health,)	
)	
Respondent.)	

DECISION AND ORDER

I. Statement of the Case

The American Federation of Government Employees, Local 2978 ("Complainant" or "Union"), filed an Unfair Labor Practice Complaint, an Amended Complaint and a Motion for Preliminary and Injunctive Relief, in the above-referenced case. In their Complaint the Complainant alleges that the District of Columbia Department of Health ("DOH" or "Respondent") violated D.C. Code § 1-617.04 (a)(1) and (3) (2001 ed.) by: (1) coercing employees in the exercise of their rights; (2) discriminating against employees because of their union activity; (3) threatening reprisals for union activity; (4) relocating the Union's office; and (5) transferring the union president. In addition, the Complainant asserts that the Union's president's "overall performance rating was '[u]nsatisfactory' [and] among the reasons listed for this negative rating was her failure to meet a work quota due to her performance of official union duties." (Compl. at pgs. 2-3).

The Complainant further claims that "the Interim Director of DOH, Herbert Tillery, met with employees in the HIV/AIDS Administration and told them that the fact that they had recently formed a union would make it easier for him to disband the [HIV/AIDS Administration]." (Motion at p. 1)

The Complainant asserts that by making this statement, Mr. Tillery was threatening employees with retaliation for forming a union. (Amended Compl. at p.3 and Motion at p. 1) The Complainant is asking the Board to grant its request for preliminary relief on the basis of Mr. Tillery's alleged statement. In addition, the Complainant is requesting that the Board order DOH to: (1) cease and desist from discriminating against or threatening Union president Jo Ann McCarthy; (2) cease and desist from discriminating against employees at the HIV/AIDS Administration; (3) relocate the Union office to its former location; (4) void the unsatisfactory performance rating issued to Ms. McCarthy; (5) make Ms. McCarthy whole for any and all losses; (6) provide Ms. McCarthy with the option to transfer back to her previous assignment; and (8) cease and desist from violating the Comprehensive Merit Personnel Act. (Motion at pgs. 8-9 and Compl. at p. 4).

The Respondent filed answers to the Unfair Labor Practice Complaint and the Amended Complaint. In their answers the Respondent denies all the substantive charges in the Complaint and Amended Complaint. In addition, DOH filed a response opposing the Complainant's Motion for Preliminary Relief. In its response to the Motion, DOH argues that the Complainant has not satisfied the criteria for granting preliminary relief.

The "Motion for Preliminary and Injunctive Relief" is before the Board for disposition.

II. Discussion

The Complainant claims that on June 3, 2004, Herbert Tillery began his official appointment as the Interim Director of DOH (Motion at p.2.) Also, the Complainant contends that during the month of June, Mr. Tillery held meetings with employees of DOH. Id. The employees in the Department of Health, HIV/AIDS Administration ("HAA"), attended the meetings in groups of about 12-15 employees, by alphabetical order of their last names. Id. The Complainant contends that on June 23, 2004, Mr. Tillery called a meeting of approximately 12-15 employees in HAA including Chief Shop Steward Deontrinese Henderson. Id. Only Mr. Tillery and the HAA employees were present at the meeting. Id.

The Complainant asserts that at the June 23rd meeting, Mr. Tillery said that he intended to disband the HAA and reassign employees to other positions within DOH. Id. The Complainant claims that Mr. Tillery stated that it would be easier to do this because employees in the HAA had recently unionized and the DOH did not have the money for such things. Id.

Since this meeting, the Complainant contends that Mr. Tillery has made statements to the press confirming that he intends to make staffing changes in HAA. Id. "According to Chief Shop Steward Deontrinese Henderson, the statements made by Mr. Tillery regarding his intent to disband the recently unionized HAA have created significant fear among the employees and a pronounced reluctance to participate in any activities that may associate them with the Union. Id.

The Complainant claims that "[t]he statement of the Interim Director Tillery directly informing employees in a newly certified bargaining unit that his decision to disband their office and reassign the employees had been facilitated by the employees' recent unionization is a clear-cut and flagrant violation of law." (Motion at p.4) The Complainant argues that threats of discharge and threats to close operations because of union activity are serious and flagrant forms of interference with the free exercise of employee rights. (Motion at pgs 4-5) The Complainant asserts that "[t]his request for preliminary relief is based on the threats of [DOH] Interim Director Herbert Tillery to employees in HAA." (Motion at p. 2). The Complainant claims that Mr. Tillery's actions violate D.C. Code § 1-617.04(a)(1) and (3) (2001 ed.). As a result, the Complainant has filed an unfair labor practice complaint, an amended complaint and a motion for preliminary relief.

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, the 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 judgement 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 pendent lite relief." Id. at 1051. "In those instances where [PERB] 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, 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).

In its response to the Motion, DOH has disputed material elements of all the allegations asserted by the Complainant. Specifically, Respondent denies that Mr. Tillery made the statement attributed to him.

Finally, the Respondent argues that Mr. Tillery made "statements to employees and the press as reflected in the Washington Blade that DOH intends to make changes in HAA in order to improve the effectiveness and efficiency of DOH". Id. Also, the Respondent contends that "on July 13, 2004, Mr. Tillery issued a Memorandum to all DOH employees that outlined the restructuring of the DOH Administration, including organization charts. The [Respondent claims that the] reorganization specifically enhanced HAA operations because it established the HIV/AIDS Administration to report directly to the DOH Director." Id. at p. 3

It is clear that the parties disagree on the facts in this case. The Board has found that preliminary relief is not appropriate where material facts are in dispute. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporation, 45 DCR 6067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

The question of whether DOH's actions occurred as the Complainant claims or whether such actions constitute violations of the Comprehensive Merit Personnel Act ("CMPA"), are matters best determined after the establishment of a factual record through an unfair labor practice hearing.

The Complainant has failed to prove that DOH's actions meet the criteria of Board Rule 520.15. Even if the allegations are ultimately found to be valid, it does not appear that any of DOH's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOH's actions amount to a single statement made at one meeting with a small number of employees and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMPA prohibits District agencies from engaging in unfair labor practices, the alleged violations, even if proved, do not rise to the level of seriousness that would undermine public confidence in PERB's ability to enforce the CMPA.

We conclude that the Complainant 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 pendent lite relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to the Complainant following a full hearing. Therefore, we find that the facts presented are not appropriate for the granting of preliminary relief.

For the reasons discussed above, the Board: (1) denies the Complainant's request for preliminary relief; and (2) directs the development of a factual record through an unfair labor practice hearing which will be scheduled within forty five days of this decision.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainant's Motion for Preliminary and Injunctive Relief is denied.
- (2) The Board's Executive Director shall refer the unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.
- (3) A hearing shall be scheduled within forty five days of this Decision and Order. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
- (4) Following the hearing, the designated Hearing Examiner shall submit a report and recommendation to the Board no later than twenty-one (21) days following the submission of written closing arguments or post-hearing briefs.
- (5) Parties may file exceptions and briefs in support of the exceptions no later than seven (7) days after service of the Hearing Examiner's Report and recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.
- (6) Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC RELATIONS BOARD
Washington, D.C.**

November 8, 2004

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 04-U-27 was transmitted via Fax and U.S. Mail to the following parties on this the 8th day of November 2004.

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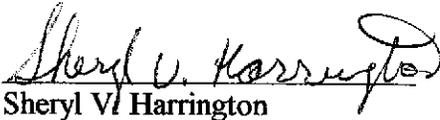
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Certificate of Service
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