Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
University of the District of Columbia Faculty Association/National Education Association,	
Complainant,	PERB Case No. 09-U-26
v.	Opinion No. 1004
University of the District of Columbia,	
Respondent.	Motion for Reconsideration and Motion to Stay

DECISION AND ORDER

I. Statement of the Case:

On October 14, 2009, the University of the District of Columbia ("UDC" or "Respondent") filed two documents styled: (1) "Motion for Reconsideration and Clarification of the Board's September 30, 2009 Decision and Order" ("Motion for Reconsideration"); and (2) a "Motion for Stay of the Board's September 30, 2009 Decision and Order" ("Motion for Stay"). These submissions concern the Board's Decision and Order in Slip Op. No. 968, PERB Case 09-U-26 (September 30, 2009).

Slip Op. No. 968 addressed an unfair labor practice complaint ("Complaint") filed by the University of the District of Columbia Faculty Association/National Education Association ("Complainant", "Association" or "UDCFA/NEA") against UDC. The Complaint alleged that:

> UDC . . . violated D.C. Code §1-617.04(a)(1) and (5)[1] [of the

[1] D.C. Code §1-617.04 provides in relevant part as follows:

> (a) The District, its agents, and representatives are prohibited from:

> Comprehensive Merit Personnel Act ("CMPA")] by: (a) "refusing to bargain in good faith, by subsequently engaging in coercive communication with bargaining unit faculty in an attempt to discourage membership in the Union"; and (b) "unilaterally distributing a revised Sixth Master Agreement deleting extensive provisions from the negotiated Sixth Master Agreement."

(Slip Op. 968 at pgs 1-2, citations omitted).

In its Complaint, the Union requested that the Board:

> (a) grant its request for preliminary relief "directing [UDC] to honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02"; (b) order UDC to cease and desist from violating the CMPA; (c) order UDC to post a notice advising bargaining unit members that it violated the law; (d) grant its request for attorney fees and reasonable costs; (e) order UDC to rescind any and all unilateral changes; and (f) grant any other remedy that the Board deems appropriate.

(Slip Op. No. 968 at p. 3).

UDC submitted an opposition to the request for preliminary relief asking that the Board deny the request. (See Slip Op. No. 968 at p. 3). In addition, UDC filed an answer to the Complaint, denying any violations of the CMPA. (See Slip Op. No. 968 at p. 3).[2] The Board determined that "the material issues of fact and supporting documentary evidence concerning UDC's failure to maintain the *status quo* until such time as the parties' efforts result in a successor agreement, [were] undisputed by the parties." (Slip Op. No. 968 at p. 9). "Thus, the allegations concerning UDC's failure to maintain the *status quo*, does not turn on disputed material issues of fact, but rather on a question of law." (Slip Op. No. 968 at p. 9). Therefore,

---

> (1) Interfering, 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.

[2]On March 20, 2009, UDC filed a Response to UDCFA's Request for Preliminary Relief, and on March 31, 2009, UDCFA filed a reply to UDC's opposition to the request. Pursuant to Board Rule 520.6, UDC filed its Answer to the Complaint on March 30, 2009. Also, on June 12, 2009, UDC submitted its Response to UDCFA's Second Request for Preliminary Relief.

pursuant to Board Rule 520.10[3], the Board determined that UDC's failure to maintain the *status quo* could appropriately be decided on the pleadings. (See Slip Op. No. 968 at p. 9).

The question of law before the Board concerned "the issue of whether management must maintain the *status quo* after expiration of the parties' collective bargaining agreement ("CBA")." (Slip Op. No. 968 at p. 10). After considering the parties' arguments, reviewing Board precedent, and examining the pertinent provisions of the CMPA and relevant legislative history, the Board concluded that UDC's failure to maintain the *status quo* pending the successful negotiation of a successor agreement constituted a violation of the CMPA. (See Slip Op. No. 968 at p. 13). Specifically, the Board stated that:

> [u]nder the facts of this case, we find that UDC's failure to maintain the *status quo* with respect to working conditions and terms of employment, constitutes a violation of the CMPA. However, we would like to make it clear that our ruling does not concern the issue of whether UDC is correct regarding its non-negotiability declaration concerning negotiations for the Seventh Master Agreement. The negotiability issues raised concerning the current negotiations for a successor agreement will be addressed by the Board when it considers PERB Case No. 09-N-02.

(Slip Op. No. 968 at p. 13).

In view of the above, the Board ordered UDC to:

> (a) maintain the *status quo* concerning the terms and conditions of employment contained in the Sixth Master Agreement; (b) honor the terms of the Sixth Master Agreement, including provisions alleged to be non-mandatory subjects of bargaining, until the completion of the negotiations for the Seventh Master Agreement and the completion of the proceedings in PERB Case 09-N-02; and (c) cease and desist from violating the [CMPA].

(Slip Op. No. 968 at pgs. 15-16) (citations omitted).

Also, the Board noted that it reviewed the parties' pleadings and found that the remaining alleged violations turned on making credibility determinations on the basis of conflicting allegations. (See Slip Op. No. 968 at p. 13). As a result, the Board determined that it could not make such determinations on the pleadings alone and that the limited record before it did not provide a basis for finding that the criteria for granting preliminary relief had been met with respect to these allegations. (See Slip Op. No. 968 at p. 13). Specifically the Board denied:

---

[3] Board Rule 520.10 provides as follows:

> If the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral arguments.

> UDCFA's request for preliminary relief concerning UDC's alleged: (1) failure to engage in impact and effect bargaining; (2) coercive communication; (3) direct dealing with bargaining unit members; and (4) failure to bargain in good faith concerning the successor agreement.

(Slip Op. No. 968 at p. 14). Therefore, the Board directed that a factual record be developed through an unfair labor practice hearing. (See Slip Op. No. 968 at p. 14).

On October 14, 2009, UDC filed the instant Motion for Reconsideration and Clarification and a Motion for Stay of the Board's Decision and Order of September 30, 2009, Slip Op. No. 968. UDCFA filed an "Opposition to UDC's Request for Reconsideration" ("Opposition to Motion for Reconsideration") and an "Opposition to Request for Stay" (Opposition to Motion for Stay"). UDC's Motions and UDCFA's Oppositions are before the Board for disposition.

II. Discussion

In its Motions, UDC does not dispute the Board's findings concerning its failure to maintain the *status quo* of the Sixth Master Agreement. (See Motion for Reconsideration at p. 3; and see Motion for Stay at p. 10). However, in support of its Motions, UDC alleges that the Board erred in its conclusion that UDC is required to maintain the *status quo* of the expired Sixth Master Agreement pertaining to provisions UDC believes "involve management rights on which UDC has a right to not negotiate." (Motion for Reconsideration at p. 4; and see Motion for Stay at p. 10). In its Motion for Reconsideration, UDC requests that the Board reverse its decision in Slip Op. No. 968, and adopt UDC's position that it is not required to maintain the *status quo* of provisions of the expired Sixth Master Agreement it deems non-negotiable pending the negotiation of the Seventh Master Agreement. In concert with UDC's request for reconsideration, UDC's Motion for Stay requests that the Board stay enforcement of its order in Slip Op. No. 968, pending: (1) the outcome of the Board's decision in PERB Case No. 09-N-02 (a negotiability appeal filed by UDCFA concerning the negotiability of proposals for the Seventh Master Agreement); and (2) any possible appeals to the District of Columbia Superior Court concerning the Board's decision in Slip Op. 968 and PERB Case No. 09-N-02. (See Motion for Stay at pgs. 1-2).

In Slip Opinion No. 968, the Board has aptly stated the bargaining history between the parties, as well as the factual allegations of the UDCFA's Complaint and request for preliminary relief. Therefore, repetition in their entirety is unnecessary. (See Slip Op. No. 968 at pgs. 1-8). Germaine to the allegations of the instant Motions is that after reviewing the parties' pleadings, the Board found it clear that: (a) the parties are engaged in negotiations for a successor agreement to the Sixth Master Agreement; (b) UDC has notified both UDCFA and bargaining unit members that subjects it considers to be "prohibited and permissive subjects of bargaining

will be treated as if they have been removed from the Sixth Master Agreement"[4]; (c) UDC has stated that it will maintain the *status quo* on all subjects it believes are mandatory until such time as the parties' efforts result in a successor agreement; and (d) UDC has advised faculty members that the items removed from the Sixth Master Agreement (prohibited or permissive) will no longer be subject to grievance or arbitration. (See Slip Op. 968 at pgs. 8-9). "UDC [states that it] does not dispute these findings are correct based upon the communications that are in the record . . . . [However] [t] o the extent that the Board's ultimate conclusions of fact are based on any other allegations made by UDCFA, they are in dispute." (Motion for Reconsideration at p. 3; and see Slip Op. 968 at p. 9).

A. UDC's Motion for Reconsideration and Clarification

As stated above, UDC does not dispute the factual allegations concerning its failure to maintain the *status quo*. (See Slip Op. 968 at p. 9). Nonetheless, "UDC asks that the Board: (l) reconsider and reverse its conclusion of law that employers who previously waived management rights and agreed to terms on otherwise non-negotiable issues are prohibited after contract expiration, from exercising their management rights on those issues until a successor agreement is reached; (2) reconsider and/or consider certain other findings and conclusions that are vague, confusing, or without record support; and (3) promptly clarify that the ULP Decision is subject to PERB Rules 559.1-559.4." (Motion for Reconsideration at pgs. 1-2)

In support of this request, UDC argues that the Board's "[e]xtension of past board precedent is contrary to law, the 2005 amendment to the CMPA and public policy." (Motion for Reconsideration at p. 3). Specifically, UDC claims that the Board's decision in Slip Op. No. 968 "is based solely on an application and extension of its holding in *Labor Committee and AFGE, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*," 31 DCR 6208, Slip Op. No. 94, PERB Case Nos. 84-U-15 and 85-U-01 (1984). (Motion for Reconsideration at p. 3). UDC agrees with the Board's conclusion in Slip Op. No. 94, that the unilateral termination of a compensation benefit after the expiration of "one contract and while the parties were actively negotiating a successor agreement . . . was so destructive to the collective bargaining process that it was a refusal to bargain in good faith prohibited by CMPA §1-617.04(a)(5)." (Motion for Reconsideration at pgs. 3-4). Therefore, UDC asserts "that it has and will continue to maintain in full force all provisions of the expired Sixth Master agreement related to wages, compensation and other negotiable issues. [However, UDC alleges that in this case] all of the provisions at issue involve management rights on which [it] has a right to not negotiate." (Motion for Reconsideration at p. 4).

In its Opposition to UDC'S Request for Reconsideration, UDCFA counters that the Board's determination in Slip Op. No. 968 was not based solely on its holding in Slip Op. No. 94, but that the Board also "relied upon *District of Columbia Fire and Emergency Medical*

[4] See January 15, 2009 memorandum sent to faculty members by UDC's Office of Human Resources and the Office of the General Counsel, at p. 2.

Services Department and AFGE Local 3721, [54 DCR 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007)]." (Opposition to Request for Reconsideration at p. 2). UDCFA explains that in that case, the Board "carefully analyzed the 2005 amendment to the CMPA, the amendment upon which UDC expressly relied. PERB carefully reviewed, and quoted from, the legislative history of the amendment, to conclude that the Council of the District of Columbia had not intended to permit employers to engage in self-help by repudiating an agreement it had made." (Opposition to Request for Reconsideration at p. 2).

UDC's arguments were considered and rejected by the Board in Slip Op. No. 968. Specifically, we stated the following:

> In *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*, 31 DCR 6208, Slip Op. No. 94 at p. 1, PERB Case Nos. 84-U-15 and 85-U-01 (1984), the Board considered the "question of whether the District of Columbia, as Employer, may cancel, when a collective bargaining agreement expires, employee dental and optical insurance coverage established under the agreement." The Board determined that the District could not cancel dental and optical insurance coverage when the parties' CBA expired. In reaching this determination, the Board noted that:
>
> > The position taken here by the unions has been upheld consistently and without discovered exception by the National Labor Relations Board (applying the terms of Section 8(a)(5) of the National Labor Relations Act, which are virtually identical with those of Section 1-618.4(a)(5)[5] of the D.C. Code), by other public employment boards (also administering similar statutory provisions), by the federal district courts and courts of appeal, and by the Supreme Court of the United States. The conclusion which has been reached is dictated clearly by the letter of the law and equally by the practicalities of responsible collective bargaining.
> >
> > An extended line of cases applies this same principle to situations, paralleling exactly the facts of the present case, in which the employer canceled insurance plans of one kind or another while negotiations for a new collective bargaining agreement were in progress. The holdings have been, consistently, that such action violates the

[5] Now codified at D.C. Code §1-617.04(a)(5) (2001 ed.).

> duty-to-bargain provisions in the National Labor Relations Act and in virtually all state public employment statutes. *Hinson v. NLRB*, 428 F.2d 133 (8th Circuit, 1970); *In re Cumberland School District*, 100 LRRM 2059 (Pa. Supreme Ct., 1978); *cf. Borden, Inc., v. NLRB*, 196 NLRB 172 (1972).
>
> The good sense underlying this uniform body of precedent is plain. If employers were entitled to make unilateral changes in existing wage rates or *other terms and conditions of employment where an agreement expires and while a new one is being negotiated, it would invite unrestrained coercive action by the employers and inevitable retaliatory and disruptive action by unions.* The statutory prohibition on coercive action and the statutory duty to bargain collectively about changes in established wage rates ***and other terms and conditions of employment are designed specifically to prevent this kind of chaos.*** *They have special point in public employment situations, in which strikes or similar employee action are prohibited.*
>
> The employer's contention here that this general rule becomes inapplicable if the contract places a termination date on specific terms of the agreement misconceives the basis of the rule. *The obligation to continue the established terms and conditions of employment flows from the statute, not from the terms of the agreement.* (Emphasis added). (Slip Op. No. 94 at p. 3).

Consistent with our holding in the *FOP* case, we find that UDC must maintain the *status quo* concerning the terms and conditions of employment contained in the Sixth Master Agreement until the parties negotiate a successor agreement.

Also, UDC claims that the 2005 amendment to the CMPA supports its claim that permissive subjects of bargaining do not survive the expiration of the parties' CBA. On April 13, 2005, the CMPA was amended at D.C. Code §1-617.08(a-1) (Supp. 2005). The following language was added at subsection (a-1):

> *(a-1) An act, exercise, or agreement of the respective personnel authorities (management)*

> *shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.* (Emphasis added).

In *District of Columbia Fire and Emergency Medical Service Department and American Federation of Government Employees, Local 3721,* 54 DCR 3167, Slip Op. No. 874, PERB Case No. 06-N-01 (2007), the Board considered one of the first negotiability appeals filed after the April 2005 amendment. In that case the Board stated "that at first glance, the above amendment could be interpreted to mean that the management rights found in D.C. Code §1-617.08(a) may no longer be a subject of permissive bargaining. However, it could also be interpreted to mean that the rights found in §1-617.08(a) may be subject to permissive bargaining, if such bargaining is not considered as a permanent waiver of that management right or any other management right. As a result, [the Board indicated] that the language contained in the statute is ambiguous and unclear. Therefore, in order to determine the intent of the City Council, the Board reviewed the legislative history of the 2005 amendment." Slip Op. No. 874 at p. 8.

The Board noted that "[t] he section-by-section analysis prepared by the Subcommittee on Public Interest, chaired by Councilmember Mendelson, stated as follows:

> Section 2(b) also protects management rights generally by providing that no 'act, exercise, or agreement' by management will constitute a more general waiver of a management right. *This new paragraph should not be construed as enabling management to repudiate any agreement it has, or chooses, to make. Rather, this paragraph recognizes that a right could be negotiated. However, if management chooses not to reserve a right when bargaining, that should not be construed as a waiver of all rights, or of any particular right at some other point when bargaining.* (emphasis added)." Slip Op. No. 874 at p. 8.

After reviewing the legislative history of the 2005 amendment, the Board observed that under the 2005 amendment:

> (2) *management may not repudiate any previous agreement concerning management rights* during the term of the agreement; (emphasis added). Slip

Op. No. 874 at p. 8.

In view of the above, we find that the legislative history concerning the 2005 amendment to the CMPA, does not support UDC's claim that permissive subjects of bargaining do not survive the expiration of the parties' CBA. Therefore, we find that UDC's argument lacks merit.

For the reasons discussed, we find that UDC's "action was patently coercive in violation of Section 1-[617.04] (a) (1) of the D.C. Code. Changing the existing employment terms unilaterally during the renegotiation period is plainly a refusal to bargain collectively in good faith under Section 1-[617.04] (a) (5)."[6] *FOP/MPD Labor Committee and IAF, Local 36 and D.C. Office of Labor Relations and Collective Bargaining*, 31 DCR 6208, Slip Op. No. 94 at p. 6, PERB Case Nos. 84-U-15 and 85-U-01 (1984). In view of the above, it is unnecessary to examine further or determine whether UDC's action is also a violation of the *status quo* provision of D.C. Code§1-617.17 (f) (4).[7]

Under the facts of this case, we find that UDC's failure to maintain the *status quo* with respect to working conditions and terms of employment, constitutes a violation of the CMPA. However, we would like to make it clear that our ruling does not concern the issue of whether UDC is correct regarding its non-negotiability declaration concerning negotiations for the Seventh Master Agreement. The negotiability issues raised concerning the

---

[6] In *American Federation of* State, County *and Municipal Employees, Local 2776 v. D.C. Department of Finance and Revenue*, 37 DCR 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990), we held that "a violation of the employer's statutory duty to bargain [under D.C. Code § 1-617.04(a)(5)] also constitutes derivatively a violation of the counterpart duty not to interfere with the employees' statutory rights to organize a labor union free from interference, restraint or coercion, to form, join or assist any labor organization or to refrain from such activity; and to bargain collectively through representatives of their own choosing." See also, *American Federation of Government Employees, Local 2725 v. District of Columbia Housing Authority*, 46 DCR 8356, Slip Op. No. 597 at p. 5, PERB Case No. 99-U-33 (1999); *Committee on Interns and Residents v. D.C. General Hospital*, 43 DCR 1490, Slip Op. No. 456, PERB Case No. 95-U-01 (1996).

[7] UDCFA also contends that the UDC's action is in violation of D.C. Code§ 1-617.17(f)(4). (See Complainant's Reply to Respondent's Opposition to Request for Prel. Relief at p. 2). Specifically, UDCFA suggests that since it has been determined that the parties are at impasse concerning negotiation for a successor Seventh Master Agreement, UDC must maintain the *status quo*. After setting out rules for collective bargaining negotiations, in paragraph (1), (2) and (3), subsection (f)(4) provides:

> (4) If the procedures set forth in paragraph (1), (2) or (3) of this subsection are implemented, no change in the status quo shall be made pending the completion of mediation and arbitration, or both.

> current negotiations for a successor agreement will be addressed by the Board when it considers PERB Case No. 09-N-02.

(Slip Op. No. 968 at pgs. 10-13).

In light of the Board's thorough analysis in Slip Op. No. 968, it is clear that the arguments raised by UDC in its Motion for Reconsideration were made, considered, and rejected in Slip Op. No. 968 by evidence of the above language. Moreover, the precedent relied on by the Board has not been reversed by the courts. [8] Thus, UDC's request for reconsideration is merely a disagreement with Board's determination in this case. The Board has repeatedly held that a motion for reconsideration cannot be based upon mere disagreement with its initial decision. (See *AFGE Local 2725 v. District of Columbia Department of Consumer and Regulatory Affairs and Office of Labor Relations and Collective Bargaining*, _DCR_, Slip Op. No. 969, PERB Case No. 06-U-43 (2009); see *D.C. Department of Human Services and Fraternal Order of Police Department of Human Services Labor Committee*, 52 DCR 1623, Slip Op. No. 717, PERB Case Nos. 02-A-04 and 02-A-05 (2003); see *D.C. Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee (Shepherd)*, 49 DCR 8960, Slip Op. No. 680, PERB Case No. 01-A-02 (2002); see *AFSCME Local 2095 and AFSCME NUHHCE and D.C. Commission on Mental Health Services*, 48 DCR 10978, Slip Op. No. 658, PERB Case No. 01-AC-01 (2001).

In addition, UDC has failed to provide any authority which compels reversal of the Board's decision in Slip Op. No. 968. Instead, UDC attempts to provide a distinction between the National Labor Relations Act ("NLRA") and the CMPA regarding the classification of subjects of bargaining, *i.e.* mandatory and permissive subjects of bargaining. However, as expressly noted in Slip Op. No. 968, in finding that UDC must maintain the *status quo*, the Board was not ruling on the non-negotiability of issues raised during negotiations for a successor agreement. (See Slip Op. No. 968 at p. 13). The Board stated that "**we would like to make it clear that our ruling does not concern the issue of whether UDC is correct regarding its non-negotiability declaration concerning negotiations for the Seventh Master Agreement. The negotiability issues raised concerning the current negotiations for a successor agreement will be addressed by the Board when it considers PERB Case No. 09-N-02.**" (Slip Op. No. 968 at p. 13) (emphasis added).

Furthermore, the Board has already identified and considered the issues raised in the cases cited by UDC in support of its argument that an employer can unilaterally change terms and conditions of employment. As stated above, the Board's ruling concerning this issue has not been overturned. Also, UDC's citation of, and reliance on, NLRB cases and cases concerning the application of the NLRA are not applicable because they involve employers and unions in the

[8] See Slip Op. Nos. 94 and 874.

private sector, and do not address the concerns associated with "public employment situations".[9] (Slip Op. No. 94 at p. 3).

Also, UDC's reliance on *UDCFA/NEA v. UDC*, 43 DC Reg. 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994) is misplaced. In that case, UDCFA claimed that UDC had unilaterally changed its practice regarding the employment of bargaining unit members to teach courses. The Board held that the unilateral change did not constitute an unfair labor practice because a "change in a practice that is specifically covered by an *effective* collective bargaining agreement lies not within the statutory authority of the Board, but in the available rights and obligations arising from the collective bargaining agreement." (*Id.* at pgs. 2-3) (emphasis added). Slip Op. No. 387 is clearly distinguishable from the instant matter because it did not involve maintaining the *status quo* of an expired collective bargaining agreement during negotiations for a successor agreement, but a unilateral change to an existing collective bargaining agreement that could be addressed under the agreement's grievance and arbitration procedure. In addition, the Board in Slip Op. No. 387 found that UDCFA had made no request to bargain over the impact and effects of the change. (*Id.* at pgs. 3-4).

UDC also contends that the effect of Slip Op. No. 968 would: (1) take away the employer's right to "unilaterally decide whether to waive its management rights, and for how long"; (2) "shift to the union the power to influence how long an employer's waiver of its management rights will continue"; (3) create lengthy administrative procedures concerning negotiability; (4) affect management's ability to reform conditions and make improvements; and (5) create a chilling effect on future agreements to waive management rights. (See Slip Op. No. 968 at pgs. 14-15). However, UDC provides no authority or factual basis for these assertions. These contentions are merely a disagreement with the Board's decision and, as stated above, do not provide a basis for reconsideration.

In support of its request for reconsideration, UDC asks that the Board clarify its findings in Slip Op. No. 968. (See Motion for Reconsideration at p. 15). Essentially, UDC requests that the Board make additional findings that UDC's violation of the CMPA only concerns its failure to maintain the *status quo*. (See Motion for Reconsideration at pgs. 15-19). In the present case, there is no ambiguity in the Board's findings in Slip Op. No. 968 requiring such clarification. Moreover, the Board specifically noted the following in denying UDCFA's request for preliminary relief:

> Next, we will consider UDCFA's request for preliminary relief regarding the remaining allegations. It is clear from the pleadings that the parties disagree on the facts concerning UDC's alleged: (1) failure to engage in impact and effect bargaining; (2)

---

[9] UDC cites *Allied Chem. & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. Auto Workers*, 523 U.S. 653 (1998); *Clarke v. Ward Baking Co.*, 191 A.2d 450 (D.C. 1963); *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970); *Am. Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir.1968); *Pall Corp.* v. *NLRB*, 275 F.3d 116 (D.C. Cir. 2002); *Midwest Television, Inc. d/b/a KFMB Stations*, 343 NLRB 748 (2004).

> coercive communication; (3) direct dealing with bargaining unit members; and (4) failure to bargain in good faith concerning the successor agreement. These remaining alleged unfair labor practice violations turn essentially on making credibility determinations on the basis of conflicting allegations. We cannot do so on the pleadings alone. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met with respect to these allegations. In cases such as this, the Board has found that preliminary relief is not appropriate. See, *DCNA v. D.C. Health and Hospital Public Benefit Corporation,* 45 DCR 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998) (footnote omitted).

(Slip Op. No. 968 at p. 13). Thus, it is clear that the Board did not rely on the disputed allegations in the pleadings and that no additional findings clarifying the Board's decision are necessary.

In addition, UDC asserts that there is no basis in the record for the Board's Order directing that UDC maintain the *status quo* until the completion of the proceedings in PERB Case 09-N-02. Specifically, UDC claims:

> The Board does not explain the basis for [this] requirement, and it is not supported by the record. If UDC's position on the merits of this Motion is upheld, then in order to grant preliminary relief to prevent UDC from exercising its management rights pending the completion of PERB Case No. 09-N-02, the Board would need to make findings under PERB Rule 520.15.

(Motion for Reconsideration at p. 18).[10] The Board determined that UDC violated the CMPA by not maintaining the status quo after expiration of the Sixth Master Agreement. As a remedy, the Board ordered UDC to maintain the *status quo* until the successful completion of the negotiations for the Seventh Master Agreement. Logically, this requires that UDC maintain the *status quo* pending **both** the Board's adjudication of the negotiability appeal and the conclusion of successful negotiations for a Seventh Master Agreement. Thus, the Board finds no merit to UDC's claim that the Board must grant preliminary relief to prevent UDC from exercising its management right.

Lastly, UDC requests that the Board clarify that its decision in Slip Op. No. 968 is not a grant of preliminary relief, making the decision final under Board Rule 559.5. (See Motion for

[10] Board Rule 520.15 - Preliminary Relief – provides that the "Board may order preliminary relief. A request for such relief shall be accompanied by affidavits or other evidence supporting the request. Such relief may be granted 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 may be clearly inadequate.

Reconsideration at p. 19).[11] The Board's decision in Slip Op. No. 968 clearly states that its finding concerning the *status quo* is a decision on the pleadings, pursuant to Board Rule 520.10. (See Slip Op. No. 968 at p. 9). Again, there is no ambiguity in the Board's findings which would warrant granting UDC's request for reconsideration.

In light of the above, we find that the Motion for Reconsideration fails to establish a statutory basis for reversal of the Board's Decision in Slip Op. No. 968. Therefore, the Board denies UDC's Motion for Reconsideration of the Board's Decision and Order in Slip Op. No. 968.

B. UDC's Motion for Stay

UDC requests that the Board stay enforcement of its Decision and Order in Slip Op. No. 968 pending the Board's disposition of UDC's Motion for Reconsideration and/or the Board's disposition of Case No. 09-N-02. In the alternative, UDC requests that if its Motion for Reconsideration is denied, that the Board stay enforcement of its Decision and Order pending a possible appeal to the District of Columbia Superior Court.

In support of its Motion, UDC claims that Slip Op. No. 968 is unclear as to whether it is granting preliminary relief or making a ruling on the pleadings. (See Motion for Stay at p. 3). In Slip. Op. No. 968, the Board unambiguously states that it is making a decision on the pleadings with regard to UDC's failure to maintain the *status quo*. (See Slip Op. No. 968 at p. 9).

The Board has previously considered the issue of whether a stay of enforcement of an order is appropriate where a party has appealed the matter to the District of Columbia Superior Court. The Board has held that its "Rules and the CMPA do not provide for an automatic stay when a party files an appeal with the Superior Court. As a result, the Board must look at the facts in this case in order to determine whether to grant [UDC's] motion to stay enforcement pending the outcome of the agency's appeal to the Superior Court." *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 48 DCR 10993, Slip Op. No. 664 at p. 2, PERB Case No. 99-U-27 (2001). UDC contends that the Board has discretion to grant such a stay when the movant has established compelling reasons to grant the stay. (See Motion for Stay at p. 4).[12] However, UDC fails to

---

[11] Board Rule 559.5 provides that:

> The Board's Decision and Order granting preliminary relief shall become final upon issuance, and a motion for reconsideration shall not operate as a stay of the Board's Decision and Order granting preliminary relief, unless the Board orders otherwise.

[12] UDC and UDCFA both cite *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. D.C. Metropolitan Police Department*, 48 DCR 10993, Slip Op. No. 664, PERB Case No. 99-U-27 (2001); and *In re Unions in Comp. Unit 21 and D.C. Department of Health,_* DCR_, Slip Op. No. 699, PERB Case No. 02-N-02 (2003), in which the Board held that despite the absence of regulatory authority, it may grant a stay upon a showing of a compelling reason.

provide any compelling reasons that would warrant a stay in this case.

First, UDC alleges that the instant matter is a "novel issue" and must be decided by the Superior Court. (See Motion for Stay at p. 5). UDC provides no authority which would require a stay where an issue is "novel". Moreover, the Board has previously ruled on whether a party must maintain the *status quo* of an expired collective bargaining agreement pending completion of negotiations for a successor agreement. Therefore, the issue in this case is not novel.

UDC claims that another compelling reason to stay the Order pending an appeal to the D.C. Superior Court is the irreparable harm to its management operations that could be caused by an order to maintain the *status quo*. (See Motion for Stay at p. 6).

In addition, UDC claims that the public interest will be adversely affected absent a stay because UDC students will be impacted by UDC's inability to exercise its management rights.. (See Motion for Stay at p. 8). UDC further asserts that management rights will be disrupted to all District of Columbia agencies facing the expiration of a collective bargaining agreement and that unions will unduly lengthen the negotiation process if an employer cannot unilaterally void provisions from an expired agreement it deems non-negotiable. (See Motion for Stay at pgs. 8-10). These contentions are based upon mere speculation and have no factual basis justifying a stay in this matter. In addition, UDC raised some of these allegations in the Motion for Reconsideration and the Board rejects them as mere disagreements with its previous decision.

The Board has noted that, "the overriding purpose and policy of relief afforded under the CMPA, for unfair labor practices which violate employee rights, is the protection of rights that inure to all employees." *Charles Bagenstose v. D.C. Public Schools*, 41 DCR 1493, Slip Op. No. 283 at p.3, PERB Case No. 88-U-33 (1991). Therefore, if UDC is not required to comply with the Board's Order in this case, "the CMPA's policy and purpose of guaranteeing the rights of all employees is undermined." See *Barbara Milton v. District of Columbia Water and Sewer Authority*, Slip Op. No. 639, PERB Case Nos. 98-U-24 and 98-U-28 (2000). Specifically, those "employees who are most aware of [UDC's] illegal conduct and thereby affected by it, would not know that exercising their rights under the CMPA is indeed fully protected." *Id.*

UDC has failed to cite any Board precedent to support its motion for stay and has failed to provide compelling factual bases that support granting the requested relief. Therefore, UDC's "Motion for Stay of the Board's September 30, 2009 Decision and Order" is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The University of the District of Columbia's ("UDC") Motion for Reconsideration and Clarification of the Board's September 30, 2009 Decision and Order is denied.

2. UDC's Motion for Stay of the Board's September 30, 2009 Decision and Order is denied.

3. Pursuant to Board Rules 559.1, 559.3 this Decision and Order is effective and final upon issuance.

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

December 30, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 09-U-26 was served via FAX and U.S. Mail to the following parties on this the 30th day of December, 2009.

Jonathan G. Axelrod, Esq.
Beins, Axelrod, P.C.
1625 Massachusetts Ave., N.W. Suite 500
Washington, D.C. 20036

FAX AND U.S. MAIL

Robert Duston, Esq.
Anessa Abrams, Esq.
Saul Ewing LLP
2600 Virginia Avenue, N.W.
Suite 1000
Washington, D.C. 20037

FAX AND U.S. MAIL

Andrea M. Bagwell, Esq.
Assistant University Counsel
Office of the General Counsel
University of the District of Columbia
4200 Connecticut Avenue, N.W.
Building 39, Suite 30-L
Washington, D.C. 20008

FAX AND U.S. MAIL

Courtesy Copy:
Mark Farley
Vice President for Human Resources
and Chief Negotiator
University of the District of Columbia
4200 Connecticut Avenue, N.W.
Washington, D.C. 20003

U.S. MAIL

David B. Washington (for Sheryl Harrington)
Sheryl V. Harrington
Secretary