Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 872	
Complainant,	PERB Case No. 00-U-19
v.	Opinion No. 630
District of Columbia Water and Sewer Authority	
Respondent.	

DECISION AND ORDER ON REQUEST FOR PRELIMINARY RELIEF

On March 13, 2000, the American Federation of Government Employees, Local 872 (AFGE) filed an Unfair Labor Practice Complaint and Motion for Preliminary Relief. In addition, on March 17, 2000, the Complainant filed a document styled "Amended Unfair Labor Practice Complaint". The Complaint alleges that the District of Columbia Water and Sewer Authority (WASA) violated D.C. Code Sec. 1-618.4(a)(1),(3) and (5) by: (a) unilaterally implementing new electronic mail and hours of work policies; (b) discriminating against Jocelyn Johnson (President, Local 872); and (c) failing to engage in impact bargaining. (Comp. at p.2) Also, AFGE contends that WASA's new electronic mail policy violates Article 44 of the collective bargaining agreement (CBA).[1]/ (Comp. at 2) AFGE has requested that the Board grant its request for preliminary relief ordering WASA to: (1) cease implementation of the electronic mail and hours of work policies; (2) rescind the proposed discipline of Jocelyn Johnson; and (3) engage in impact and effect bargaining. (Mot. at p.3.) WASA opposes the Complainant's Motion for Preliminary Relief, arguing that the allegations contained in the Complaint do not satisfy the criteria for granting preliminary relief.

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[1]/ AFGE asserts that prior to the February 2000 change in policy, employees were permitted to use WASA's facilities for personal and union business. According to AFGE, the use of WASA's facilities is permitted by Article 44 of the Master Agreement on Working Conditions, provided that the use does not: (1) interfere with the regular functioning of Authority activities; and (2) involve any additional expense to the Authority.

AFGE argues that "WASA has implemented numerous personnel changes effecting terms and conditions of employment without bargaining with Local 872 or the other unions representing WASA's employees."[2]/ (Mot. at p.2) AFGE contends that "[n]egotiations are required over the impact and effect of the changes even if negotiations are not required over the merits of the decisions." Id. However, AFGE asserts that WASA has refused to bargain over the impact of the new policies.

WASA admits that it implemented new electronic mail and hours of work policies. However, WASA alleges that it has not engaged in any conduct which violates the Comprehensive Merit Personnel Act (CMPA).

In addition, WASA asserts that the proposed disciplinary action against Ms. Johnson, has not been implemented and is the subject of a pending grievance filed by AFGE. In light of the above, WASA argues that: (1) AFGE's request is premature; and (2) the Board should defer ruling on WASA's alleged discriminatory conduct until a decision is rendered concerning the grievance.

Without deciding whether the allegations indicate a violation of the CMPA, the Board concludes that inadequate evidence was presented to establish that the remedial purposes of the law would be served by pendente lite relief. For the reasons discussed below, we find that the Complainant's request for preliminary relief does not meet the threshold criteria that the Board has adopted for granting preliminary relief.

The criteria the Board employs for granting preliminary relief is prescribed under 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 may be clearly inadequate.

The Board has held that its authority under Board Rule 520.15 is discretionary. 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 this rule, the Board

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[2]/ In addition to AFGE Local 872, four other unions are parties to the Master Agreement on Working Conditions: AFGE Locals 631 and 2553; AFSCME Local 2091; and NAGE Local R3-05 and 06. None of these four unions has joined as a party in PERB Case No. 00-U-19. However, all five unions have filed an unfair labor practice complaint against WASA (PERB Case No. 00-U-14) alleging that WASA unilaterally implemented a variety of new personnel policies and procedures. Also, on March 20th, Local 872 filed another unfair labor practice complaint against WASA (PERB Case No. 00-U-20) alleging similar violations.

has adopted the standard stated in Automobile Workers v. NLRB, 449 F.2d 1046 (CA DC 1071). 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 pendente lite relief." Id. at 1051. "In those instances where the Board has determined that the standard for executing its discretion has been met, the bases for such relief were 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).

AFGE claims the facts alleged in the Complaint are undisputed. AFGE's claim is correct only with respect to the implementation dates of the new electronic mail and hours of work policies. Specifically, the parties agree that the new electronic mail and hours of work policies were implemented on February 4, 2000 and February 25, 2000, respectively. However, a dispute exist as to whether: (1) AFGE's Complaint allegations are timely; (2) WASA had a duty to bargain with AFGE prior to implementation of the new policies; (3) AFGE waived its right to engage in impact bargaining; (4) the proposed disciplinary action is properly before the Board; and (5) WASA has violated Article 44 of the CBA.

The parties agree that pursuant to Article 44, Section A of the CBA, WASA may institute new or revised work rules, subject to "notice and consultation" with AFGE. Also, Article 44, Section B, provides that "[u]pon request, the parties shall negotiate as appropriate" over WASA's exercise of its management rights. In the instant case, the parties disagree over whether AFGE made such a request to bargain over the change in electronic mail and hours of work policies. In addition, under Article 44, the use of WASA's facilities by AFGE is, as AFGE itself concedes, subject to the limitations noted above.

We have held that "[a] unilateral change in established and otherwise bargainable terms and conditions of employment does not constitute an unfair labor practice under the CMPA, where such terms and conditions are specifically covered...by the provisions of a collective bargaining agreement between the parties." University of the District of Columbia Faculty Association v. University of the District of Columbia, 43 DCR 5594, Slip Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). In addition, it is well settled that contractual violations fail to state a statutory cause of action under the CMPA. See, AFGE, Local 3721 v. D.C. Fire Dept., 39 DCR 8599, Slip. Op. No. 287, PERB Case No. 90-U-11 (1992). In light of the above, it is not clear whether the alleged violation constitutes a statutory contractual violation.

Also, we have found that management's rights under D.C. Code § 1-618.8(a) do not relieve it of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning, the implementation of these management right decisions.

IBOP, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). The effect and impact of a non-bargainable management decisions upon terms and conditions of employment, however, are bargainable only upon request. Teamsters, Local 639 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). Furthermore, the Board has held that absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-618.4(a)(5) and (1), by unilaterally implementing a management right under D.C. Code § 1-618(a), without notice or bargaining. University of the District of Columbia Faculty Association v. University of the District of Columbia, 43 DCR 5594, Slip, Op. No. 387, PERB Case Nos. 93-U-22 and 93-U-23 (1994). In view of the above, the determination of whether AFGE requested bargaining is a "question of fact".

In its response, WASA disputes the material elements of all the allegations asserted in the Complaint. 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 5067, Slip Op. No. 550, PERB Case Nos. 98-U-06 and 98-U-11 (1998). Moreover, AFGE acknowledges that preliminary relief is inappropriate if material facts are in dispute.

Furthermore, AFGE does not claim that WASA's alleged illegal actions are widespread or seriously affect the public interest. In addition, it does not appear that WASA's unilateral implementation of new e-mail and hours of work policies (without bargaining), constitute clear cut and flagrant violations of the CMPA. Whether WASA'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.

AFGE asserts that preliminary relief is appropriate because any later remedy imposed by the Board would be inadequate. However, AFGE has failed to provide affidavits or other evidence which demonstrate that the allegations, even if true, are such that the remedial purposes of the law would be served by pendente lite relief. As a result, we conclude that should violations be found in the instant case, the relief requested can be accorded with no real prejudice to AFGE.

AFGE cites, without explanation, the Board's decision in AFGE et al. v. Government of the District of Columbia, Slip Op. No. 501, PERB Case No. 97-U-01, (1996), in support of its contention that WASA's unilateral changes in policies prior to the Board ruling on the unfair labor practice complaint, interferes with the Board's processes. Such alleged interference is not obvious to this Board.

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. Therefore, the circumstances presented do not appear appropriate to warrant preliminary relief.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant's request for preliminary relief is denied.

2. PERB Case Nos. 00-U-14, 00-U-19 and 00-U20 are consolidated.

3. The Executive Director shall refer the Consolidated Complaints to a Hearing Examiner and schedule a hearing under the expedited scheduled set forth below.

4. The Notice of Hearing shall issue seven (7) days prior to the scheduled date of the hearing.

5. 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 conclusion of closing arguments (in lieu of post-hearing briefs).

6. 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 that five (5) days after service of the exceptions.

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

July 14, 2000

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 00-U-19 was served by first class mail, on the following parties on this 14th day of July, 2000.

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