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

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| In the Matter of: |) | |
| Wanda J. Ferguson, |) | PERB Case No. 09-U-19 |
| Complainant, |) | Opinion No. 1419 |
| v. |) | |
| District of Columbia Child and Family Services Agency, |) | Decision and Order |
| Respondent. |) | |

DECISION AND ORDER

I. Statement of the Case

Complainant Wanda J. Ferguson (“Complainant” or “Ms. Ferguson”) filed a *pro se* Amended Unfair Labor Practice Complaint¹ (“Complaint”) against District of Columbia Child and Family Services Agency (“Respondent” or “CFSA” or “Agency”), alleging CFSA violated D.C. Code §§ 1-617.04(a)(1), (3), and (4) and §§ 1-617.06(a)(2)-(3) and (b) of the Comprehensive Merit Personnel Act (“CMPA”) by: 1) interfering with Ms. Ferguson’s right to fair representation through failing to give advance notice to the exclusive representative, AFSCME, Local 20 (“Union”), that it intended to suspend Ms. Ferguson without pay for ten (10) days; 2) retaliating against Ms. Ferguson for engaging in protected “concerted activity for mutual aid and protection”; 3) “interrogating” Ms. Ferguson about her union “sympathies and activities”; 4) “coercively” implying that Ms. Ferguson had “renounced [her] union”; 5) meeting

¹ Ms. Ferguson’s original Complaint (filed on February 3, 2009, was deficient in that it was filed without Ms. Ferguson having signed it, and because Ms. Ferguson failed to provide the then requisite six (6) copies. On February 17, 2009, PERB’s then-Executive Director, Julio A. Castillo, notified Ms. Ferguson by letter of these deficiencies, and gave Ms. Ferguson until March 7, 2009, to cure them. Ms. Ferguson filed an Amended Complaint curing the deficiencies on February 17, 2009.

with Ms. Ferguson several times without first notifying the Union; 6) issuing a grievance decision without first meeting with Ms. Ferguson and the Union as had been requested; 7) engaging in and admitting to a “clear cut and flagrant pattern and practice of CMPA violations”; and 8) finding that allegations raised by Ms. Ferguson in an Equal Employment Opportunity (“EEO”) complaint were “unfounded”. (Complaint, at 2-5).

In its Answer, CFSA admitted that some of the meetings and other events alleged in the Complaint took place, but denied Ms. Ferguson’s allegations and legal conclusions that its conduct in relation to those events constituted unfair labor practices or a violation of any provision of the CMPA. (Answer, at 1-5). In addition, CFSA presented three (3) affirmative defenses in which it argued that the Complaint should be dismissed “because: 1) it is frivolous, factually unsupported, and erroneous, and fails to state a cause of action; 2) it fails to state an unfair labor practice for which relief may be granted; and 3) the Board lacks jurisdiction over the matter as the Complaint does not give rise to a cause of action, under the [CMPA].” *Id.*, at 5-11.

II. Background

On September 19, 2008, Ms. Ferguson’s immediate supervisor, Derrick Russell (“Mr. Russell”), gave Ms. Ferguson a 30-day Advanced Written Notice of Proposed Suspension of 10 Days (“Proposed Discipline”), based upon an allegation that Ms. Ferguson had been insubordinate when she submitted affidavits to the court without first obtaining the approving initials of either Mr. Russell, or another employee who was authorized to approve Ms. Ferguson’s work. (Complaint, at 2); and (Answer, at 2). Ms. Ferguson alleged that CFSA interfered with her right to fair representation, “in a showing of apparent anti-union animus,” by not giving the Union prior notification of its intent to discipline Ms. Ferguson. (Complaint, at 2). CFSA denied that it interfered with Ms. Ferguson’s right to representation and contended that, prior to giving the notice to Ms. Ferguson, Mr. Russell sent her an email to tell her that they would meet later in the day and that she was entitled to have a Union representative present. (Answer, at 2). CFSA contended that “within minutes of sending the email, [Ms. Ferguson] went to Mr. Russell’s office to speak with him about the matter, but he stopped the conversation and told her that he could not speak with her at that time and that she should bring a union representative to the meeting scheduled later that day.” *Id.* CFSA asserted that, despite these notices, Ms. Ferguson “later arrived at the meeting without Union representation.” *Id.*

Ms. Ferguson claimed that, in her written response to the Proposed Discipline, she provided phone records demonstrating that she had called Mr. Russell several times “according to his unwritten (not in the procedures manual) phone approval policy for affidavits” before she submitted them to the court; refuted Mr. Russell’s assertion that she did not seek his approval on

the cases mentioned in the Proposed Discipline; argued that just because the affidavits did not have Mr. Russell's "approval initials" did not mean they were not approved; contended that she had approached Mr. Russell and the other employee who was authorized to approve her work twice on September 4, 2008, seeking approval of the affidavits in question; stated that Mr. Russell had been absent that day until approximately 2:00PM, at which point she spoke with him and the other approving employee about her cases; argued that she did not leave that meeting "thinking [she] didn't have approval;" and showed how the functioning of the unit suffered because of Mr. Russell's "lack of supervision due to frequent unannounced absences." (Complaint, at 2). CFSA "[did] not admit" to Ms. Ferguson's claims regarding this written response.

On October 15, 2008, Ms. Ferguson met with CFSA Placement Services Administrator, Jill Forbes ("Ms. Forbes"), who was the deciding official regarding Ms. Ferguson's proposed discipline. (Complaint, at 2); and (Answer, at 2-3). Mr. Russell and another CFSA Placement Services Administrator, Nicole Cobbs-Sterns, were present. *Id.* At this meeting, Ms. Forbes provided Ms. Ferguson with her written decision which upheld the Proposed Discipline and notified Ms. Ferguson that she would serve the suspension from October 16-29, 2008. *Id.*

Ms. Ferguson claimed that Ms. Forbes further verbally told her that she "shouldn't have mentioned [Mr. Russell's transgressions] in [her written response to the Proposed Discipline]". (Complaint, at 2). Based on this alleged statement, Ms. Ferguson contended that the discipline was retaliation for her having engaged in the "protected concerted activity" of complaining, even prior to this discipline, about not being able to find a supervisor to approve her work, and about "workplace non-functioning," which she claimed was caused by Mr. Russell's "unannounced absences and disinterest, ...[his] not reviewing open case files, [his] not giving input or writing in case notes, [and his approval of] work over the phone," and which she claimed was evidenced by "complaints of internal staff and external customers." *Id.* She further asserted that the charge of insubordination was a "pretext for [CFSA's] reprisal" against her for having engaged in said "protected concerted activity." *Id.* CFSA denied or "[did] not admit" to these statements and allegations. (Answer, at 3).

On October 29, 2008, the Union filed a written step 3 grievance on behalf of Ms. Ferguson to challenge the discipline. (Complaint, at 2); and (Answer, at 3). The grievance stated that the Union was not given prior notice of CFSA's intention to discipline Ms. Ferguson. *Id.*

Ms. Ferguson alleged that on October 31, 2008, CFSA "engaged in interference, restraint, and coercion by [interrogating Ms. Ferguson]" in the office of Human Resource Manager for Labor and Employee Relations, Dexter Starks ("Mr. Starks"), when Mr. Starks questioned her "about [her] union sympathies and activities", and when he "demanded repeatedly in an

intimidating tone that [she] answer his question [about] whether or not [Mr. Russell's] email on 9/19/08 mentioned the union." (Complaint, at 3). Ms. Ferguson asserted that when she confirmed that Mr. Russell's email did mention the Union, Mr. Starkes then blamed her, "in a condescending tone", for not having a Union representative present at the meeting later that day. *Id.* Ms. Ferguson contended in the Complaint that it was not her responsibility to notify the Union, but the Agency's. *Id.* Ms. Ferguson further alleged that the content and timing of this October 31, 2008, meeting with Mr. Starkes was suspect because she originally requested to meet with an EEO Counselor, and thought that this was that meeting and that only non-union EEO topics would be discussed. *Id.* She also expressed concern that Mr. Starkes scheduled the meeting on her Union representative's normal day off. *Id.* She alleged that when the "tone of the meeting turned to interrogation," CFSA committed a "*per se* unfair labor practice," especially after Mr. Starkes told her that he knew about the Union's October 29 grievance, but that "he had no role in the outcome of the decisions concerning the discipline." *Id.*

In its Answer, CFSA denied that Mr. Starkes' October 31 meeting with Ms. Ferguson constituted an unfair labor practice, or that it interfered, restrained, or coerced Ms. Ferguson "by interrogation." (Answer, at 3). CFSA admitted that Mr. Starkes met with Ms. Ferguson at her request "to discuss her claim of discrimination", but denied that a Union representative had to be present because the meeting only "pertained to non-disciplinary matters." *Id.* CFSA further asserted that Ms. Ferguson never requested that a Union representative be present. *Id.* CFSA denied Ms. Ferguson's "statements referencing Mr. Starkes and [did] not admit to [Ms. Ferguson's] remaining statements and allegations [regarding the October 31 meeting]." *Id.*

On November 6, 2008, Ms. Forbes issued her response to the Union's Step 3 grievance, in which she upheld Ms. Ferguson's suspension. (Complaint, at 3); and (Answer, at 3-4). Ms. Ferguson alleged that Ms. Forbes' response "coercively [mentioned Ms. Ferguson's] union sympathies and activities by referencing [her] 'conscience'" and implied that Ms. Ferguson had "renounced" her Union. (Answer, at 3). Ms. Ferguson further alleged that Ms. Forbes cited additional cases that were not listed in her original decision and denied that CFSA had violated the CMPA "when [it] had already admitted to the violation." *Id.* In its Answer, CFSA asserted that the November 6 response to the grievance noted that while Ms. Ferguson had the right to Union representation when she met with Mr. Russell on September 19, she had "elected not to be represented, and that given her failure to follow directives, the suspension for insubordination [stood]." (Answer, at 3-4). CFSA further denied that it violated the CMPA and denied Ms. Ferguson's remaining allegations concerning Ms. Forbes' November 6 response to the Union's Step 3 grievance. *Id.* On November 20, 2008, Ms. Ferguson filed a Step 4 grievance. (Complaint, at 4); and (Answer, at 4).

On November 24, 2008, CFSA Program Manager, Regi Daniel ("Mr. Daniel"), asked to meet with Ms. Ferguson, in which he and Mr. Russell explained "chain of command and office

procedures.” (Complaint, at 3); and (Answer, at 4). Ms. Ferguson alleged that this meeting “occurred without management notice to the union and in the midst of [Ms. Ferguson’s Step 4 grievance].” (Complaint, at 3). CFSA denied that the Union had to be present at the meeting which it claimed only “pertained to non-disciplinary matters,” and denied Ms. Ferguson’s remaining statements and allegations concerning the meeting. (Answer, at 4).

On December 11, 2008, CFSA’s Interim Director issued a final written decision regarding Ms. Ferguson’s Step 4 grievance, in which he upheld Ms. Ferguson’s suspension. (Complaint, at 4); and (Answer, at 4). Ms. Ferguson alleged that this written decision was almost identical to Ms. Forbes’ November 6 response to the Step 3 grievance and that the Interim Director was “influenced by the retaliatory biased subordinate managers” on the basis that Ms. Ferguson “spotted [Ms. Forbes] near the Director’s Office on 12/11/08.” *Id.* Ms. Ferguson further alleged that the Interim Director “discriminatorily persisted in retaliation by sustaining harm of discipline without meeting with [Ms. Ferguson] and [the] union delegate as requested [in the Step 4 grievance letter].” *Id.* Additionally, Ms. Ferguson alleged that the Interim Director’s letter evidenced anti-union animus when it stated that Ms. Ferguson was “jeopardizing the integrity of the [unit]” and admitted a “clear cut and flagrant pattern and practice of CMPA violations.” *Id.* CFSA denied that the December 11 Step 4 grievance decision violated the CMPA, discriminated against Ms. Ferguson, or constituted an unfair labor practice, and denied Ms. Ferguson’s remaining statements and allegations concerning the decision. (Answer, at 4).

On December 16, 2008, Ms. Forbes, Mr. Daniel, and Mr. Russell met with Ms. Ferguson to discuss Mr. Russell’s absences, office procedures, and points of contact. (Complaint, at 4); and (Answer, at 4). Ms. Ferguson stated that Ms. Forbes told her that Mr. Russell was a trainer and that he often conducts trainings outside of the office. *Id.* Ms. Ferguson alleged that Ms. Forbes further told her, “in a showing of discriminatory disparate treatment”, that Ms. Ferguson “[didn’t] need to know what [Mr. Russell’s] schedule is” or “where he is.” (Complaint, at 4). Ms. Ferguson further alleged that the meeting took “a retaliatory, intimidating, coercive, interrogatory tone” when Ms. Forbes asked her if she “felt comfortable in the unit” and if she could go to Mr. Russell with her concerns. *Id.* Ms. Ferguson alleged that CFSA did not give the Union prior notice of this meeting and that she felt it implied that “union animus and reprisal [was] imminent.” *Id.* CFSA denied that it “violated the CMPA or that the meeting was retaliatory, intimidating, coercive or interrogative, or that the Union had to be present at the meeting which pertained to non-disciplinary matters”, and denied Ms. Ferguson’s remaining statements and allegations concerning the December 16 meeting. (Answer, at 4-5).

Ms. Ferguson alleged that on January 7, 2009, she overheard Mr. Russell tell a co-worker that he wanted to “advertise” Ms. Ferguson’s position after she filed her grievance. (Complaint, at 4). Ms. Ferguson contended that Mr. Russell’s alleged statement evidenced ongoing “[d]iscriminatory, retaliatory, anti-union animus.” *Id.* CFSA denied that Mr. Russell’s actions

toward Ms. Ferguson were “retaliatory, discriminatory, or anti-union”, and denied Ms. Ferguson’s remaining statements and allegations concerning Mr. Russell’s alleged January 7 statement. (Answer, at 5).

On January 22, 2009, CFSA Human Resources Generalist, Brandi Pope (“Ms. Pope”), met with Ms. Ferguson to let her know that the internal investigation of Ms. Ferguson’s EEO complaint had concluded and been deemed, “unfounded” or “unsubstantiated.” (Complaint, at 4); and (Answer, at 5). Ms. Ferguson alleged that Ms. Pope interfered, restrained, and coerced Ms. Ferguson’s exercise of her statutory rights when she told Ms. Ferguson that she should “let sleeping dogs lie” and that it was “a New Year.” (Complaint, at 4). CFSA denied Ms. Ferguson’s allegation. (Answer, at 5). CFSA further asserted that Ms. Pope informed Ms. Ferguson that CFSA did not have an EEO Counselor at that time, so she would need to speak with an EEO Counselor at another agency, but that Ms. Ferguson said she did not want a list of those other counselors when Ms. Pope offered to provide one. *Id.*

As a result of these alleged violations, Ms. Ferguson requested that the Public Employee Relations Board (“PERB”) order CFSA to: 1) cease and desist violating Complainant’s rights; 2) cease and desist its refusal to bargain; 3) not engage in any future violations of the CMPA; 4) post appropriate notices of its alleged violations of the CMPA; 5) restore Complainant’s lost wages, with interest, for the period of suspension (October 16-19, 2008); and 6) make Complainant “whole” “to the status quo ante”; and order “any other remedy the PERB sees fit.” (Complaint, at 5).

In its Answer, CFSA presented three (3) affirmative defenses that the Complaint should be dismissed “because: 1) it is frivolous, factually unsupported, and erroneous, and fails to state a cause of action; 2) it fails to state an unfair labor practice for which relief may be granted; and 3) the Board lacks jurisdiction over the matter as the Complaint does not give rise to a cause of action, under the [CMPA].” Answer, at 5-11.

PERB has no record of any other pleadings having been filed in this matter. Ms. Ferguson’s Complaint is therefore now before the Board for disposition.

III. Discussion

Generally, a complainant does not need to prove its case on the pleadings, but it must plead or assert allegations that, if proven, would establish a statutory violation of the CMPA. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department, et al.*, 59 D.C. Reg. 5427, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09 (2009) (citing *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 and District of Columbia Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994)); see also *Goodine v. Fraternal Order of Police/Department of Corrections Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996). If the record demonstrates that the allegations do concern violations of the CMPA, then the Board has jurisdiction over those allegations and can grant relief accordingly if they are proven. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013) (citing *American Federation of Government Employees, Local 2741 v. District of Columbia Department of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697 at p. 6, PERB Case No. 00-U-22 (2002)).

In addition, a *pro se* litigant is entitled to a liberal construction of his/her pleadings and must be given a reasonable opportunity to present his/her case without undue focus on technical flaws or imperfections. *Charles Bagenstose v. Washington Teachers' Union, Local No. 6*, 59 D.C. Reg. 3808, Slip Op. No. 894 at p. 3, PERB Case No. 06-U-37 (2007) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); and *Mack v. Fraternal Order of Police/Metropolitan Police Department Labor Committee*, 49 D.C. Reg. 1149, Slip Op No. 443 at p. 2, PERB Case No. 95-U-16 (1995)).

Furthermore, PERB has jurisdiction over claims of reprisal and retaliation involving District of Columbia government agencies. See *Hina L. Rodriguez v. District of Columbia Metropolitan Police Department*, Slip Op. No. 906 at p. 3, PERB Case No. 06-U-38 (January 30, 2008); see also *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657 at 665-66 (D.C. 1994).

Finally, PERB Rule 520.8 states: “[t]he Board or its designated representative shall investigate each complaint.” Rule 520.10 states that “[i]f 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 argument.” However, Rule 520.9 states that in the event “the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties.” (Emphasis added).

In the present case, Ms. Ferguson alleges that CFSA violated the CMPA by engaging in interference, restraint, coercion, direct dealing, bad faith, retaliation, and reprisal. (Complaint, 1-5). While her allegations may at times be technically flawed or imperfect, the Board finds that, by applying a liberal construction to the Complaint, Ms. Ferguson presents allegations against

CFSA that, if proven, could constitute statutory violations of the CMPA. See *FOP v. MPD, et al., supra*, Slip Op. No. 984 at p. 6, PERB Case No. 08-U-09; and *Bagenstose v. WTU, Local 6, supra*, Slip Op. No. 894 at p. 3, PERB Case No. 06-U-37. As a result, the Board finds that its jurisdiction over this matter is proper. See *FOP v. MPD, supra*, Slip Op. No. 1391 at p. 22, PERB Case Nos. 09-U-52 and 09-U-53; *Rodriguez v. MPD, supra*, Slip Op. No. 906 at p. 3, PERB Case No. 06-U-38; and *Office of the D.C. Controller v. Frost*, 638 A.2d 657 at 665-66, *supra*.

Furthermore, based on CFSA's denial of Ms. Ferguson's characterization of the facts, material allegations, and legal conclusions, and in consideration of CFSA's affirmative defenses, the Board finds that this matter presents a material dispute of facts which cannot be reconciled by a review of the pleadings alone. Therefore, pursuant to PERB Rule 520.9, the Board refers this matter to an unfair labor practice hearing to develop a factual record and make appropriate recommendations. See *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5957, Slip Op. No. 999 at p. 9-10, PERB Case 09-U-52 (2009); and *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. District of Columbia Metropolitan Police Department*, 59 D.C. Reg. 5969, Slip Op. No. 1000 at p. 9-10, PERB Case 09-U-53 (2009); see also PERB Rule 520.8.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board's Executive Director shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and present recommendations in accordance with said record.
2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

September 3, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 09-U-19, Slip Op. No. 1419, was transmitted via U.S. Mail and e-mail to the following parties on this the 23rd day of September, 2013.

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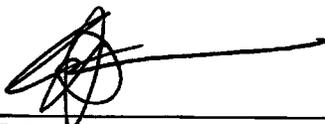
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