Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

Government of the District of Columbia
Pubic Employee Relations Board

American Federation of Government Employees, Local 383,	
Complainant,	PERB Case No. 09-U-45
v.	Opinion No. 975
District of Columbia Department of Disability Services,	**Motion For Preliminary Relief**
Respondent.	

DECISION AND ORDER

I. Statement of the Case:

On June 29, 2009, the American Federation of Government Employees, Local 383 ("AFGE," "Union" or "Complainant") filed two documents styled "Unfair Labor Practice Complaint" and "Motion for Preliminary Relief" against the District of Columbia Department of Disability Services ("DDS" or "Respondent"). The Complainant alleges that DDS has violated D.C. Code §1-617.04(a)(1) and (5)[1] by: (a) its unilateral decision to eliminate employee parking and requiring employees to use public transportation; and (b) failing to bargain with AFGE over the impact and

[1]D.C. Code §1-617-04 provides in relevant part as follows:

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

effects of DDS' new parking policy and its policies concerning travel and the use of Zipcars. (See Motion at p. 7, and Compl. at p. 5).

AFGE is requesting that the Board: (a) grant its request for preliminary relief; (b) order Respondent to adhere to the parties' collective bargaining agreement; (c) order Respondent to cease and desist from violating the Comprehensive Merit Personnel Act ("CMPA"); (d) order Respondent to post a notice advising bargaining unit members that it violated the law; (e) grant its request for reasonable costs; (f) order Respondent to restore the *status quo*; (g) order Respondent to withdraw the Zipcar and travel policies; and (h) order Respondent to make bargaining unit employees whole for any monetary loss incurred as a result of its departure from the *status quo*. (See Motion at pgs. 13-14 and Compl. at p. 5).

On July 10, 2009, DDS filed a document styled "Reply to Complainant's Motion for Preliminary Relief" ("Opposition"). In addition, on July 17, 2009, DDS filed an answer to the unfair labor practice complaint. In their submissions, DDS: (1) denies that it has violated the CMPA; and (2) requests that AFGE's motion for preliminary relief ("Motion") be dismissed. (See Opposition at p. 6). AFGE's Motion and DDS' Opposition are before the Board for disposition.

II. Discussion:

On April 22, 2009, DDS Director Judith Heumann created an "administrative issuance" the subject of which was "Employee Parking Options."The document outlines the policy for reimbursement for parking of personal vehicles and Zipcars. The document purports to supersede, in part, DDS Policy Number 6.7 Employee Travel Policy. AFGE contends that, according to the issuance, "the new policy [would] take effect June 30, 2009. [In addition, AFGE claims that] [t]he document was issued to employees on or about May 28, 2009." (Compl. at p. 2).

By letter dated May 22, 2009, Office of Labor Relations and Collective Bargaining ("OLRCB") informed the Union that, effective June 30, 2009, DDS would eliminate employee parking at the agency's offices at 1125 15th Street, Northwest. DDS further announced that employees required to travel in the D.C. metro area for their official duties will be expected to use public transportation. DDS also stated that, where public transportation does not meet operational needs, employees may use Zipcars with prior written supervisory approval. (See Compl. at p. 2 and Answer at p. 2).

By letter dated May 29, 2009, Union President John Walker demanded immediate bargaining over the implementation of the new employee parking policy and government vehicle/Zipcar program that is set to take effect on June 30, 2009. The Union demanded certain information regarding the policy. The Union also demanded that DDS delay implementation of the policy until negotiations are concluded.

On June 19, 2009, the parties convened for a meeting, the purpose of which was to negotiate over the impact and effects of the Zipcar policy. In attendance at the meeting were Deborah Bonsack, Ruth Cook, and Turna Lewis all of DDS, Dennis Jackson and Dean Aqui of OLRCB, Union President John Walker, Union counsel Brenda Zwack, and several other representatives from the Union. At the meeting, the Union asked numerous questions about how the Zipcar policy would work in practice and what it would mean for employees who must regularly visit DDS's consumers located throughout the D.C. metropolitan area and beyond. (See Compl. at p. 3 and Answer at p. 2). DDS was unable to answer many of the Union's questions about the Zipcar program, including questions presented in the Union's request for information, but agreed to find the answers to those questions and provide them to the Union. AFGE contends that since "DDS was unable to answer the Union's questions, it was not possible to complete negotiations over the implementation of the Zipcar policy. The Union demanded that DDS withdraw the policy until DDS supplied the requested information and negotiations could be completed." (Compl. at p. 3).

At the June 19th meeting, the Union also demanded that DDS withdraw its travel policy until it bargained with the Union over the policy. At the meeting, OLRCB stated that DDS would not bargain with the Union over the travel policy. (See Compl. at p. 3 and Answer at p. 3). The Union requested that DDS put in writing its position regarding whether it would withdraw the Zipcar policy pending the completion of negotiations; withdraw its travel policy pending negotiation with the Union; and persist in its unilateral withdrawal of parking privileges for all employees.

On June 22, 2009, OLRCB requested that the Union provide a written list of the Union's oral requests for bargaining information as articulated at the June 19, 2009 meeting. Union counsel responded to OLRCB by letter dated June 24, 2009. The Union reiterated in writing its oral requests for information regarding at least 23 aspects of the Zipcar program.

"By letter dated June 24, 2009, to Union counsel, Dennis Jackson expressed DDS's response to the Union's demand that the Zipcar policy be withdrawn pending the completion of negotiations and the travel policy be withdrawn pending negotiation with the Union. The letter stated: "The Agency is unable to acquiesce with your request to withdraw the Zipcar policy since funds to continue the current parking arrangement are no longer in the budget. The Zipcar program is the alternative method of employees being able to provide services to their clients where travel is required." (Compl. at p. 4. Also see Answer at p. 4).

The letter also stated that, with regard to the travel policy, "...any claim that the Union has a right to negotiate over mileage reimbursement, a compensation item, would be rejected." Further, the letter set forth DDS's position that any demand to bargain over the travel policy was untimely. (Compl. at p. 4. Also see Answer at p. 4).

AFGE contends that by the conduct described above DDS has violated D.C. Code § 1-

617.04(1) and (5). (See Compl. at p. 5). Specifically, AFGE asserts that the Respondent has violated D.C. Code § 1-617.04(1) and (5) by: (a) its unilateral decision to eliminate employee parking and requiring employees to use public transportation; and (b) failing to bargain over the impact and effects of DDS' new parking policy and its policies concerning travel and the use of Zipcars. (See Motion at pgs. 7-13 and Compl. at p. 5).

AFGE is requesting that the Board grant its request for preliminary relief. In support of its position, AFGE asserts the following:

> PERB has made clear that management rights set forth in D.C. Code § 1-617.08 do not relieve management of the obligation to bargain over the impact and effect of the implementation of decisions made pursuant to those rights. . . . After the Union has made a timely request to bargain over the impact and effects of such a decision, the Agency must bargain before implementing its decision. . . . The Agency's failure and refusal to bargain with the Union constitutes a violation of D.C. Code § 1-614.04 (a)(1). On May 22, 2009, DDS informed the Union of its intent to make a unilateral change to its policy of providing employees who are required to travel for their official duties with free daily parking and mileage reimbursement. Within one week of the announcement, the Union requested impact and effects bargaining regarding this change in the employees' working conditions. Thus, the Union's request was timely and triggered DDS's obligation to bargain with the Union before implementing its decision to end employee parking and require employees to use public transportation or Zipcars to perform the work of the Agency. Although the parties did meet on June 19, 2009, DDS was not sufficiently informed regarding the nature of the proposed Zipcar plan to allow meaningful bargaining. Despite the Union's specific written request for information about the Zipcar program, . . . DDS could not answer the Union's basic questions regarding the program. For example, DDS representatives had no knowledge regarding how many Zipcars would be available, how the employees would pay for fuel, whether or how they would be insured, what rules would apply to employees when using cars, or how much the program would cost in comparison to the current cost of parking. . . .The Union demanded the policy be suspended until DDS supplied the requested information and the parties had completed impact bargaining. Although at the close of the meeting DDS promised to provide this information, it has since stated its intent to implement the

> program without further bargaining and without providing the requested information. . . . In addition to the Agency's flat refusal to comply with its obligations, DDS made clear that it never intended to negotiate with the Union in good faith. The Agency's lack of good faith is evident in its June 24, 2009 statement that the program could not be suspended because "funds to continue the current parking arrangement are no longer in the budget." . . . Thus, it appears that, even when it met with the Union on June 19, 2009, the decision to eliminate employee parking was a fait accompli and DDS had no intention of engaging the union in meaningful bargaining over any aspect of the program or its impact on employees or the community. Thus, because DDS was obligated to complete bargaining with the Union before implementing a unilateral change, and has stated its refusal and inability to do so, DDS's violation of the obligation to bargain in good faith with the Union over the impact and effects of a unilateral change . . . could not be more clear-cut or flagrant. (Motion at pgs. 9-11)

In addition, AFGE asserts that DDS' violation is widespread, the public interest is seriously affected and the Board's ultimate remedy may be ineffective. (See Motion at pgs. 11-13).

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 Boards processes are being interfered with, and the Boards 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, this 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 pendente lite relief." Id. at 1051. "In those instances where the Board has determined that [the] standard for exercising its discretion has been met, the bases 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, the Respondent asserts that AFGE's request for preliminary relief should be denied because AFGE has failed to meet any of the elements necessary for obtaining preliminary relief. (See Opposition at p. 2). In support of its position, Respondent asserts the following:

> [The] Complainant has failed to show that the Agency's conduct is a clear-cut and flagrant violation of the CMPA. The Agency has no obligation to bargain over its travel and Zipcar policies because the Union failed to timely request bargaining over these policies that have been in effect and used by employees with the Union's knowledge. Also, the Union has been given an opportunity to bargain over the Agency's change in parking policy. However, it failed to submit any alternative proposals and the Agency proceeded to implement the change in parking policy. Complainant has failed to show with specificity that this change in parking policy will have serious widespread affect on the public or that the remedial purposes of the law will be served by *pendent lite* relief. Therefore, Complainant's Motion for Preliminary Relief must be dismissed. (Opposition at p. 2)

In addition, DDS disputes the material elements of the allegations asserted in the Complaint and the Motion. Specifically, Respondent asserts the following:

> The Complainant's requests to bargain over the Agency travel policy and Zipcar program were untimely. Both programs have been in existence, with the Union's knowledge, since at least October of 2008. Thus, the Union's request to bargain over these programs at this date is untimely. The parties met to bargain over the impact and effects of the Agency's new parking policy on June 19, 2009. In the Complaint, the Union does not allege that the Union asked any questions or presented proposals with regard to the new parking policy. The Union gave no indication that a second meeting was necessary to complete bargaining over the Agency's parking policy, thus, bargaining was complete. Therefore, the Respondent moves that the Complaint be dismissed in its entirety. (Answer at pgs. 4-5).

In view of the above, DDS requests that the Board: (1) find that it has not committed an unfair labor practice; and (2) deny AFGE's request for preliminary relief. (See Opposition at p. 7 and

Answer at p. 5).

After reviewing the parties' pleadings it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these 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. 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).

Furthermore, AFGE's claim that DDS' actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of DDS' actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DDS' actions presumably affect bargaining unit members. However, DDS' actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMPA prohibits the District, its agents and 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, AFGE has 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 AFGE has failed to provide evidence which demonstrates that the allegations, even if true, are such that 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 AFGE following a full hearing.

For the reasons discussed above, we: (1) deny AFGE's request for preliminary relief; and (2) direct the development of a factual record through an unfair labor practice hearing.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 383's Motion for Preliminary Relief is denied.

2. The Board's Executive Director shall refer the Complaint to a Hearing Examiner for disposition. Pursuant to Board Rule 550.4 the Notice of Hearing shall be issued fifteen (15) 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
Washington, D.C.

September 30, 2009

CERTIIFICATE OF SERVICE

This is to certify that the attached Decision in PERB Case No. 09-U-45 was served via FAX and U.S. Mail to the following parties on this the 30th day of September, 2009.

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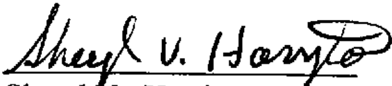

Sheryl V. Harrington
Secretary