

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
Public Employee Relations Board**

In the Matter of:)	
)	
American Federation of)	
Government Employees, Local 2978,)	
)	PERB Case No. 14-U-01
Complainant,)	
)	Opinion No. 1443
v.)	
)	
District of Columbia)	
Department Health,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 2978 (“Union,” “AFGE,” or “Complainant”) filed the above-captioned Unfair Labor Practice Complaint (“Complaint”), against Respondent District of Columbia Department of Health (“Agency,” “DOH,” or “Respondent”) for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act (“CMPA”). Specifically, the Union asserts that the Agency failed to convert bargaining unit employees from term status to career status, and furnish requested information. (Complaint at ¶¶ 12-13). Respondent filed an answer (“Answer”) in which it denies the alleged violations and raises the following affirmative defenses:

- (1) The Complaint is untimely;
- (2) The Complaint fails to allege conduct that constitutes an unfair labor practice; and
- (3) The Board lacks jurisdiction over the Complaint.

(Answer at 7). The Complaint and Answer are before the Board for disposition.

II. Background

The Union asserts that on or about March 8, 2011, it met with representatives from the Agency to demand compliance with Article 20 “Term and Temporary Employees” of the CBA between the D.C. Government and Labor Organizations Representing Compensation Units 1 and 2. (Complaint at ¶ 5). The Union states that Union president Robert Mayfield sent a follow-up e-mail on March 28, 2011, demanding that the Agency comply within five business days by converting bargaining unit employees from term status to career status. *Id.* The Union contends that several bargaining unit members are paid from federal Ryan White or Housing Opportunities for Persons with HIV/AIDS (“HOPWA”) grant money. (Complaint at ¶ 10). The Union asserts that in the HOPWA program, the Agency has “steadily received increase allotments from 2008-2011, and as other bargaining unit members have been converted, there is enough money to convert these three and others as contractually obligated to by both parties.” *Id.* Further, the Union alleges that other unions at DOH have had their bargaining unit members converted to career status, but members of Local 2978 have been denied. (Complaint at ¶ 12).

Additionally, the Union contends that it and other unions have requested impact and effects bargaining, and the reconvening of a joint labor-management committee on four different occasions during meetings with the Agency. (Complaint at ¶ 13). The Union states that the information was requested during meetings on May 7, 2012, January 25, 2013, April 19, 2013, and July 9, 2013, but never furnished by the Agency. *Id.*

For reasons which will be discussed below, the Agency’s responses to the Union’s factual allegations will not be considered.

III. Discussion

A. Timeliness of the Answer

Board Rule 520.6 requires that an answer be filed “within fifteen (15) days from service of the complaint.” Board Rule 520.7 states, in part: “A respondent who fails to file a timely answer shall be deemed to have admitted the material facts alleged in the complaint and to have waived a hearing.” In the instant case, the Complaint was filed on October 1, 2013. The Answer was filed on November 1, 2013 – thirty-one (31) days after the Complaint was filed. Therefore, the Answer is untimely, and the Agency is deemed to have admitted the material facts alleged in the Complaint, and to have waived a hearing.¹

¹ In the certificate of service attached to its Answer, the Agency states: “The undersigned certifies that by agreement with the Union the timeline for filing the Respondent’s Answer to Complainant’s Unfair Labor Practice Complaint in PERB Case No. 14-U-01 was extended to November 1, 2013...” The time period for filing an answer to an unfair labor practice complaint is set by the Board in Board Rule 520.6. Board Rule 501.2 describes the method for obtaining an extension of time to file a pleading: “A request for an extension of time shall be in writing, and made at least three (3) days prior to the expiration of the filing period. Exceptions to this requirement may be granted for good cause shown as determined by the Executive Director.” The Agency did not file a written request for an extension of time to file its Answer, pursuant to Board Rule 501.2. Therefore, the Answer is untimely, regardless of any agreement reached privately with the Union.

B. Timeliness of the Complaint

Although the Agency's affirmative defense that the Complaint is untimely cannot be considered because the Answer itself was untimely filed, the Board must raise the issue *sua sponte*. Board Rule 520.4 states: "Unfair labor practice complaints shall be filed no later than 120 days after the date on which the alleged violations occurred." This 120-day requirement is jurisdictional and mandatory. *See Hoggard v. D.C. Public Schools*, 43 D.C. Reg. 1297, Slip Op. No. 352, PERB Case No. 93-U-10 (1996).

The Agency's alleged failure to comply with the Union's March 8, 2011, and March 28, 2011, requests to convert bargaining unit members from term to career status are untimely, and cannot form a basis for an unfair labor practice complaint. *See* Board Rule 520.4. For these allegations to be timely, a complaint must have been filed on or before July 26, 2011. Instead, the instant Complaint was filed on October 1, 2013.

Likewise, the Union's allegation that the Agency failed to provide information requested at labor-management meetings on May 7, 2012, January 25, 2013, and April 19, 2013, are untimely. The only remaining information request allegation that is not time-barred is the Union's assertion that the Agency failed to provide information requested at a labor-management meeting on July 9, 2013. (Complaint at ¶ 13).

C. The July 9, 2013, Request for Information

The Union alleges that "AFGE Local 2978 and other Unions have requested [impact and effects] bargaining and the reconvening of the Joint Labor management committee on four (4) different occasions during Labor Management Consultation Meetings with the [Agency]. On May 7, 2012, January 25, 2013, April 19, 2013, and July 9, 2013, information was requested and promised at those meetings, but never furnished to the Unions." (Complaint at ¶ 13). The Union contends that this alleged failure to timely furnish the requested information constitutes an unfair labor practice under the CMPA. (Complaint at ¶ 12). As the Agency's Answer is untimely, the Board must deem as admitted the Union's allegation that it requested information from the Agency at a July 9, 2013, meeting, and that the information was not provided to the Union. *See* Board Rule 520.7.

Agencies are obligated to provide documents in response to a request made by a union. *American Federation of Government Employees, Local 631 v. D.C. Water and Sewer Authority*, 59 D.C. Reg. 3948, Slip Op. No. 924 at p. 5-6, PERB Case No. 08-U-04 (2007) (citing *Teamsters, Locals 639 and 730 v. D.C. Public Schools*, 37 D.C. Reg. 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and *Psychologists' Union, Local 3758 v. D.C. Dep't of Mental Health*, 54 D.C. Reg. 2644, Slip Op. No. 809, PERB Case No. 05-U-41 (2005)). An agency fails to meet its statutory duty to bargain in good faith under D.C. Code § 1-617.04(a)(5) when it fails and refuses to produce relevant and necessary information requested by an exclusive representative. *American Federation of Government Employees, Local 2725 v. D.C. Dep't of Health*, 59 D.C. Reg. 6003, Slip Op. No. 1003 at p. 4, PERB Case No. 09-U-65 (2009). In addition, "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" found in D.C. Code § 1-617.04(a)(1). *Id.* (quoting *American Federation of State, County, and Municipal Employees, Local 2776 v. D.C. Dep't of Finance and Revenue*, 37 D.C. Reg. 5658, Slip Op. No. 245 at p. 2, PERB Case No. 89-U-02 (1990)).

Accepting as admitted that the Union's allegation that its information request made July 9, 2013, was never responded to by the Agency, the Board finds that the Agency failed and refused, without a viable defense, to produce the requested information, thereby failing to meet its statutory duty to bargain in good faith under D.C. Code § 1-617.04(a)(5). *AFGE Local 2725*, Slip Op. No. 1003 at p. 4. In so doing, the Agency derivatively violated its counterpart duty to refrain from interfering with, restraining, or coercing employees in their rights, guaranteed by D.C. Code § 1-617.04(a)(1). *Id.* Therefore, only the portion of the Union's Unfair Labor Practice Complaint pertaining to the July 9, 2013, information request is granted.

D. Remedies

In its Complaint, the Union requests the Board order the Agency to:

- a. Cease and desist from violations of D.C. Code § 1-617.04(a)(1), (2), and (5) in the manner alleged or in any similar related manner;
- b. Convert Sherita Grant, Charles Sessom, staff of the Tobacco Control Program, and the remaining Department of Health eligible term employees to career employees;
- c. Post an appropriate notice to employees of [the] violation;
- d. Pay the Union's costs in the matter; [and]
- e. Any other remedy deemed appropriate.

(Complaint at unnumbered paragraph following ¶ 14).

The Board will order the Agency to cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) in the manner alleged or in any like or related manner.² Further, the Agency will provide to the Union the information requested in the July 9, 2013, meeting.

The Board will not order the Agency to convert Ms. Grant, Mr. Sessom, the staff of the Tobacco Control Program, and the remaining eligible term employees to career employees because that allegation is untimely.

Regarding the Union's request for a notice posting, the Board has previously held that "when a violation is found, the Board's order is intended to have therapeutic as well as remedial

² The Union requests the Board order the Agency to cease and desist from violations of D.C. Code § 1-617.04(a)(2), in addition to D.C. Code § 1-617.04(a)(1) and (5). As the Union alleged no violations of D.C. Code § 1-617.04(a)(2) in its Complaint, the Board will not order the Agency to cease violating that subsection of the CMPA.

effect. Moreover, the overriding purpose and policy of relief afforded under the CMPA for unfair labor practices is the protection of rights and obligations.” *National Association of Government Employees, Local R3-06 v. D.C. Water and Sewer Authority*, 47 D.C. Reg. 7551, Slip Op. No. 635 at pp. 15-16, PERB Case No. 99-U-04 (2000). Moreover, “it is the furtherance of this end, i.e., the protection of employee rights...[that] underlies [the Board’s] remedy requiring the posting of a notice to all employees concerning the violation found and the relief afforded.” *Bagenstose v. D.C. Public Schools*, 41 D.C. Reg. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). Accordingly, the Union’s request that the Agency be required to post a notice is granted.

The Board has made the following findings concerning an award of costs:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the fact of the statute that it is only those costs that are “reasonable” that may be ordered reimbursed...Last, and this is the [crux] of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued...What we can say here is that among the situation in which such an award is appropriate are those in which the losing party’s claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

American Federation of State, County, and Municipal Employees, Local 2776 v. D.C. Dep’t of Finance and Revenue, 37 D.C. Reg. 5658, Slip Op. No. 245 at p. 4-5, PERB Case No. 89-U-02 (1990). Applying this precedent to the instant case, the Board finds that the Union did not prevail in “at least a significant part of the case,” as the majority of the allegations it raised in the Complaint were untimely. Therefore, the Board finds that an award of costs is inappropriate.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Health, its agents, and representatives shall cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by failing and

refusing to respond to the information request made by the American Federation of Government Employees, Local 2978, at the July 9, 2013, meeting.

2. The District of Columbia Department of Health will provide all relevant and necessary information requested by the American Federation of Government Employees, Local 2978, at the July 9, 2013, meeting.
3. The District of Columbia Department of Health shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
4. Within fourteen (14) days from the issuance of this Decision and Order, the District of Columbia Department of Health shall notify the Board, in writing, that the Notice has been posted accordingly.
5. The remaining portions of the Complaint are dismissed.
6. 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.

November 26, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 14-U-01 was transmitted via File & ServeXpress to the following parties on this the 26th day of November, 2013.

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NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH ("DOH"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1443, PERB CASE NO. 14-U-01 (November 26, 2013):

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered DOH to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 1443.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from refusing respond to the request for bargaining information made by the American Federation of Government Employees, Local 2978, on July 9, 2013.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Department of Health

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

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

November 26, 2013