GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: AFSCME Council 20, as the Representative of AFSCME Local Unions 709, 877, 1033, 1200, 1808, 2087, 2091, 2092, 2095, 2096, 2097, 2401, 2743, and 2776, and on behalf of the Approximately 8,000 Employees in Compensation Units I and II for whom AFSCME Council 20 is the Exclusive Representative, Complainant/Labor Organization v. Government of the District of Columbia, Marion Barry, Jr., Mayor, Board of Trustees of the University of the District of Columbia Dr. N. Joyce Payne, Chairman District of Columbia General Hospital Commission Ms. Mary Lou King, Acting Chairman and District of Columbia Board of Library Trustees Mr. John C. Hazel, President,	PERB Case No.88-U-32 Opinion No. 200

DECISION AND ORDER

On September 8, 1988, the American Federation of State, County and Municipal Employees, Council 20, (AFSCME) filed this unfair labor practice complaint alleging that the Respondents distributed a letter to the District of Columbia Government employees, including employees represented by AFSCME, regarding the status of on-going negotiations. AFSCME alleges that by distributing this letter the Respondents 1) have engaged in illegal direct dealing with employees; 2) have attempted to

undermine the Union's status as bargaining representative; 3) have engaged in coercive conduct toward employees which interferes with their protected activities and their free choice of bargaining representative; and disparaged and discredited the Union in the eyes of its bargaining unit members in violation of Sections 1-618.4 (a)(1), (2) and (5) of the D.C. Code. In response to the complaint, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of the Respondents, denies the commission of any unfair labor practice in its distribution of the letter to employees.

On September 28, 1988, the Board granted the Union's request for the expedited scheduling of this case and requested the parties to submit briefs on the issues.

This case arises from the negotiation of a successor compensation agreement between the six labor organizations authorized as the collective bargaining agents and the agencies in Compensation Units I and II and noncompensation agreements between the various locals of AFSCME and the respective agencies. 1/ The parties reached a tentative successor compensation agreement on January 21, 1988. That agreement called for retroactive and prospective wage increases and the payment of optical and dental premiums by the Respondents. During the period February 26, 1988 through March 14, 1988, OLRCB was notified in writing by the representatives of the other labor organizations representing employees in Compensation Units I and II that their respective membership had ratified the compensation agreement.

In a letter dated March 2, 1988, AFSCME notified Respondents' representatives that its membership had rejected the compensation agreement in a ratification proceeding and requested the immediate resumption of negotiations with AFSCME. Respondents contended that there was no obligation to resume negotiations with AFSCME because the agreement had been ratified by the other labor organizations. As a result, AFSCME filed an unfair labor practice complaint with the Board alleging that the Respondent refused to bargain in violation of Section 1-618.4 (a)(1) and (5) of the D.C. Code. Concluding that the Respondents did not have an obligation to bargain with AFSCME alone, the Board dismissed the unfair labor practice complaint. AFSCME, Council 20 v. Government of the District of Columbia, Opinion No. 185 (PERB Case No. 88-U-23, 1988), petition pending sub nom.

1/ AFSCME is the certified exclusive representative of approximately 8,000 of the employees in Compensation Units I and II.

AFSCME v. District of Columbia (D.C. Sup. Ct. No. MPA 8-88).

In July and August, 1988, while AFSCME and the Respondents were engaged in negotiations on noncompensation matters, the Respondents implemented the negotiated general wage increases to all eligible employees, including those represented by AFSCME, but withheld payments of retroactive wage increases and the restoration of optical and dental benefits to employees represented by AFSCME. On or about September 1, 1988, OLRCB distributed to all employees covered in Compensation Units I and II a letter advising them of the amount of the wage increases for fiscal year 1989 and the retroactive increase, who would receive the retroactive wage increase and why, and when the resumption of dental and optical benefit premiums could be expected. The letter advised employees that it was being issued in response to questions OLRCB had received regarding the retroactive paychecks and optical and dental benefits. Specifically, the letter indicated that payments of retroactive paychecks should be distributed the week of September 6, 1988, noting, however, that all locals in a union must complete their working conditions contract negotiations before the employees represented by the local could receive their retroactive paychecks. The letter further noted that all locals except AFSCME's had finished negotiations and should receive the retroactive paychecks. It then stated:

> Don't be misled, this was the agreement made jointly over a year ago with the leadership of all involved Unions. Although the City was not obligated under the negotiated Groundrules to give the pay increase in July, we believe it was in everyone's best interest to do so. To date, we have received no formal complaints from the AFSCME leadership, but if we do and such complaints are valid we may have to stop the payments and recover what has already been paid. We are awaiting a response from AFSCME officials regarding their position on this issue.
>
> Under the new compensation contract the District will pay 100% of the premium for optical and dental benefit programs. Again, however, the optical and dental benefits will not be available until after your working conditions contract is completed. Generally,

> this affects only AFSCME-represented employees. The payments have been reinstated for all other Union groups, and you should contact your Union representative for information and enrollment forms regarding that local's specific plan. Please use these benefits that were negotiated for you and your family members. They should save you considerable out-of-pocket expenses.
>
> We hope this letter answers at least some of your questions. This is a confusing situation which is made worse by the rumors. If you have any questions, please call your agency's labor relations officer or you may wish to call your local Union representative.

AFSCME contends that Respondents were engaging in direct dealing with employees because the letter was an inducement to employees "to pressure their Union to reach completion of the working conditions contract negotiations so that they may receive their retroactive paychecks." It also alleges that the statement regarding the Respondents' willingness to pay the general wage increase in the absence of an obligation to do so, and which indicated that the increase may be stopped if AFSCME objected, constituted a threat of loss of a wage increase and the collection of wages already paid. This statement also conveyed the impression that the employer, rather than the Union, is the true protector of employees interest, the Union contends. The Union also claims the letter disparaged AFSCME to its members by creating the appearance that it is unreasonably holding up their retroactive paychecks and by accusing AFSCME of "misleading" its membership. AFSCME argues that the above conduct interfered with employees' right to bargain collectively through representatives of their own choosing and tended to coerce employees in the exercise of this right.

The Respondents argue that the letter only contained information that was true and which had been previously provided to the Union. Furthermore, the Respondents argue that the distribution of literature to employees describing the status of negotiations is not an unfair labor practice.

The issue before the Board is whether the employers' distribution of the challenged letter to employees violates Section 1-618.4(a)(1), (2), and (5) of the D.C. Code.

The Board concludes that the distribution of the letter by the Respondents did not violate the D.C. Code. As we explain below, the Respondents by distributing the letter neither dealt directly with employees, disparaged the Union to its members, undermined it, nor coerced or interfered with employees in their right to bargain collectively. The Board concludes that the letter was nothing more than the employer communicating to its employees on the status of negotiations, which does not, standing alone, constitute a violation of the D.C. Code.

In reaching this conclusion, the Board follows the rulings of analogous cases in the private sector. 2/ In Lear Siegler, Inc., 283 NLRB No.136, 126 LRRM 1073 (1987), and United Technologies Corp., 274 NLRB No. 163, 118 LRRM 1556 (1985), enf'd sub nom. NLRB v. United Technologies, 789 F.2d 121, 122 LRRM 2258 (2nd Cir. 1986), the National Labor Relation Board (NLRB) held that an employer has a right to communicate with employees concerning its position in negotiations and the course of negotiations. Id. The NLRB reasoned that:

> . . . free and open discussion by all parties to the collective bargaining process affords the best chance for successful conclusions of negotiations and creates the most favorable climate for successful bargaining. Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' position as to those issues. We believe employees are fully capable of evaluating the relative merits of those positions for themselves. (United Technologies, 118 LRRM at 1562.)

2/ The Board rejects the Union's contention that private sector case law is not applicable in this case because it is predicated on Section 8(c) of the National Labor Relations Act, as amended (NLRA). While there is no analogous section in the D. C. Code, the Supreme Court in NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969), noted that Section 8(c) of the NLRA is only a codification of the First Amendment right to free speech. Thus, the right exists independent of any statutory authority and is applicable in cases arising under the D.C. Code.

The Board finds that here, as in Lear Siegler, Inc., supra, and United Technologies, supra, there was nothing in the employers' communications that indicated an effort that the Respondents were attempting to deal directly with the employees or an invitation to the employees to abandon their representative to achieve better terms directly from the employer.

Contrary to the Union's contention, the letter did not contain a threat of a loss of a wage increase or collection of wages already paid. The letter simply stated that if AFSCME objected to the implementation of the general wage increase, Respondents might have to stop the increased wages and collect the increased wages already paid. Such a statement is consistent with the Respondents' obligation to bargain with the employees' exclusive representative. Accordingly, it cannot be found to constitute a threat.

The Board also finds that the letter does not disparage or undermine the Union as the employees' exclusive representative. The Respondents' use of the phrase - "don't be misled" - does not imply that the Union is being dishonest with its membership. When read in context of the entire letter, the phrase can reasonably be interpreted to refer to the "rumors" which the Respondents referred to in the first paragraph of the letter. Nor did the letter imply that the Respondents, rather than the Union, were the employees' protector. The simple reference in the letter to the fact that the Respondent implemented the general wage increase before it had an obligation to do so, without more, does not indicate that the Respondents are protecting the interest of AFSCME's members and AFSCME is not.

Moreover, the Board cannot find that the Respondents improperly induced employees to put pressure on AFSCME's leadership to complete working conditions negotiations or disparaged the Union by giving the impression that AFSCME was unreasonably holding up employees' retroactive paychecks. As Respondents have the right to advise employees of their position in negotiations and the course of negotiations, the Respondents cannot be found to have engaged in unlawful conduct by exercising this right. In this case, the Respondents advised employees of the status of negotiations and when employees could expect implementation of the agreement. That this might lead employees to pressure the Union toward the completion of negotiations does not amount to an unfair labor practice.

The Board concludes, for all the foregoing reasons, that the Respondents did not violate Sections 1-618.4(a)(1),(2) or (5) of the D.C. Code and that the complaint must be dismissed.*

ORDER

It is hereby Ordered that:

The Complaint is dismissed.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.
December 20, 1988

* Member Kohn did not participate in the vote.