GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
International Brotherhood of Police Officers, Local 445, Complainant,	
v.	PERB Case No. 94-U-07 Opinion No. 382
District of Columbia Department of Administrative Services, Bureau of Protective Services, Respondent.	

DECISION AND ORDER ON
REQUEST FOR PRELIMINARY RELIEF

On January 12, 1994, the Public Employee Relations Board (Board) issued Opinion No. 376 denying a Motion requesting preliminary relief in the above-captioned Unfair Labor Practice Complaint proceeding. The Complaint charged that the District of Columbia Department of Administrative Services, Bureau of Protective Services (DAS) violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (5) by unilaterally implementing a drug testing policy for special police officers without first bargaining with the exclusive bargaining representative, the International Brotherhood of Police Officers, Local 445 (IBPO).

The pertinent facts of this case are set forth in Opinion 376. In the Board's Order, IBPO was accorded "leave to refile a request for preliminary relief, meeting the requirements of Board Rule 520.15, should a change in the circumstances addressed in th[e] Opinion warranting such relief arise." Slip Op. at 3. On January 21, 1994, IBPO filed a second Motion renewing its request for preliminary relief, as well as an amended Unfair Labor Practice Complaint. The Office of Labor Relations and Collective

Bargaining (OLRCB), on behalf of DAS, filed a Response to the Request, urging that we, once again, deny the requested relief.

The instant Motion cures the evidentiary defects in IBPO's initial filing.[1]/ The other basis for the Board's denial of IBPO's initial request --that DAS had "agreed to suspend drug testing until January 16, 1994, to allow the parties to negotiate"-- is no longer operative. (Resp. at 4.) According to sworn affidavits of IBPO's Local President, Secretary/Treasurer and counsel, DAS has resumed drug testing employees although the parties have not completed impact-and-effects bargaining on drug testing. (Exhs. 4, 5, and 6.) OLRCB does not dispute that DAS resumed drug testing after January 16, 1994.

For the reasons explained below, we have decided to grant IBPO's request for preliminary relief.[2]/

Board Rule 520.15 in pertinent part provides:

> The Board may order preliminary relief. ... Such relief shall be granted where the Board finds that the conduct is clear-cut and flagrant, the effect of the alleged unfair labor practice is widespread, the public interest is seriously affected, the Board's processes are being interfered with, or the Board's ultimate remedy will be clearly inadequate.

The Board's authority to grant relief under Board Rule 520.15 is discretionary. D.C. Council 20, AFSCME, AFL-CIO et al. v. Government of the District of Columbia, et al., ___ DCR ____, Slip Op. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise our discretion under this Rule, the 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 judgment under Section 10(j) of the National Labor Relations Act-- held that irreparable injury need not be shown. However, the supporting evidence must "establish that there is reasonable cause to

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[1]/ IBPO had failed to meet the requirement under Board Rule 520.15 that such requests be accompanied by affidavits and other evidence of the underlying allegations that support the request.

[2]/ We stated in Opinion No. 376 in this case that "should DAS resume testing affected bargaining-unit employees pursuant to the disputed drug-testing policy prior to discharging whatever statutory obligation under the CMPA the Board may determine it has, it does so at its own risk." Slip Op. No. 376 at n. 3.

believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by pendente lite relief." Id. at 1051.

Based on the parties' pleadings and supporting affidavits, there is reasonable cause to believe that D.C. Code Sec. 1-618.4(a)(5) has been violated by DAS.[3]/ The remedial purposes of Board Rule 520.15 will be served by pendente lite relief for those employees who would otherwise be subjected to drug testing pending the full extent of the Board's processes before relief is ordered.[4]/ We have ruled that, even with respect to impact-and-

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[3]/ Even accepting OLRCB's account of the facts --that DAS provided notice on December 1, 1993 and IBPO did not request bargaining until December 10, 1993-- we do not find this relatively short period of elapsed time to be adequate to allow IBPO to exercise its collective bargaining rights prior to unilateral implementation of the drug-testing policy. (First Resp. at 2.) We find this turn-around period especially inadequate since it appears that four employees had already been drug tested by the time DAS claims IBPO requested bargaining. (First Mot., Exh. 1.) In any event, we find no basis for DAS' continuation or resumption of drug testing following IBPO's demand to bargain over the impact and effect of the testing.

[4]/ OLRCB asserts that "drug testing could not be halted because of the nature of the work and responsibility of the Special Police Officers who are licensed to carry a gun." (Resp. at 5.) OLRCB states that D.C. Municipal Regulation (DCMR), Title 17, Chapter 21, Section 2103, "requires all persons lawfully employed as a security officer, guard, or special police officer in the District of Columbia possess a current Commission" to be authorized to carry a gun. To receive or renew a commission under DCMR, Tit. 17, Ch. 21, Sec, 2103, special police officers must "submit a physician's certification stating that they are Drug Free". OLRCB argues that the commissions of employees who were tested and scheduled to be tested were about to expire. On its face, however, nothing in this regulation seems to require DAS to conduct testing, only that employees present proof that they are drug free. Such proof, conceivably, could be obtained from a private physician.

Since, DAS' unilateral action was and is not compelled by the DCMR regulation or any other law or legal obligation, cited by OLRCB, DAS was not required to go forward with drug testing before its collective bargaining obligations under the CMPA were met. Compare, D.C. Council 20, AFSCME, AFL-CIO et al. v. Government of the District of Columbia, et al., ___ DCR _____,

effects bargaining, the agency has a duty to provide notice and bargain, upon request, prior to implementation of a matter that is otherwise a management prerogative. Teamsters, Local Unions Nos. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. District of Columbia Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991).

As discussed, DAS' conduct is "clear cut and flagrant." (See n. 3.) Since DAS' policy makes drug testing a condition of obtaining or renewing a commission, all employees in this bargaining unit of protective officers are or will be eventually affected by DAS' unilateral implementation of the policy. Thus, DAS' actions are "widespread". In view of the nature of these employees' duties, i.e., assuring the safety of the public and public officials, the "public interest is seriously affected". Finally, in view of DAS' insistence on going forward with unilaterally imposed drug testing --conduct that we find to be in violation of their obligation under the CMPA-- before the Board could render a Decision and Order upon the full exercise of its processes, DAS has interfered with the Board's processes and rendered inadequate, under the circumstances, the Board's ultimate remedial authority.

As discussed in the text, relief afforded after the full extent of the Board's processes would not have been available for employees tested during the interim under DAS' unilaterally implemented drug testing policy. For employees who have already been tested, even this relief comes too late. Under the facts of this case, we conclude that DAS' actions constituting this violation gives rise to the required prescribed impact under Board Rule 520.15 for which preliminary relief may be accorded.

In granting preliminary relief, we note that on February 2, 1994, IBPO filed, pursuant to D.C. Code Sec. 1-618.17(f)(3), a Request for Impasse Resolution (PERB Case No. 94-I-02), requesting "assistance in mediating the remaining impact-and-effects issues resulting from [DAS]' decision to drug test bargaining unit employees." D.C. Code Sec. 1-618.17(f)(3) includes mediation and, if necessary, arbitration, as a statutory part of the collective bargaining process under the CMPA. Therefore, we shall grant IBPO's Motion requesting preliminary

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Slip Op. 330, PERB Case No. 92-U-24 (1992). This problem can be avoided by planning the implementation of a new management policy affecting existing terms and conditions of employment, sufficiently in advance of need, to allow for notice and an opportunity, upon request, for collective bargaining.

relief and enjoin DAS from continuing to test bargaining unit employees for drugs. This injunction is effective immediately upon the issuance of this Decision and Order and shall continue through mediation and, if invoked, the arbitration process under Section 1-618.17(f)(3). The injunction is automatically dissolved upon the execution by the parties of a voluntary agreement on the impact and effects of DAS' drug testing policy. However, if the parties are unsuccessful in resolving the issue of drug testing after the statutory mediation period, the parties may, jointly or separately, file a motion with the Board to dissolve the injunction based upon the progress of the parties' efforts or a significant change or development in the current situation.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board grants the International Brotherhood of Police Officers, Local 445's Motion for preliminary relief to the extent set forth herein.

2. The D.C. Department of Administrative Services, Bureau of Protective Services (DAS) shall immediately cease and desist from unilaterally drug testing bargaining unit employees without first meeting its obligation under the CMPA to bargain over the impact and effects of the drug testing on employees' terms and conditions of employment.

3. DAS shall continue to be enjoined from drug testing bargaining unit employees during the mediation and, if invoked, arbitration process prescribed under the Comprehensive Merit Personnel Act, D.C. Code Sec. 1-618.17(f)(3).

4. This injunction shall automatically be dissolved upon the execution of a voluntary agreement on the impact and effects of DAS' drug-testing policy or the issuance of a final and binding arbitration award pursuant to D.C. Code Sec. 1-618.17(f)(3), whichever occurs first.

5. The parties may jointly or separately move the Board to dissolve the injunction following statutory mediation based on a significant development in their negotiations or a change in other relevant factors.

6. DAS shall, within seven (7) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees

are customarily posted, while this injunction remains in effect, or for thirty (30) consecutive days, whichever is longer.

7. DAS shall notify the Public Employee Relations Board, in writing, within ten (10) days from the issuance of this Decision and Order, that it has posted the attached Notice and is otherwise complying with the terms of this Order.

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

February 16, 1994