Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 2978,	
Complainant,	
v.	PERB Case No. 14-U-14
	Opinion No. 1499
District of Columbia Department of Health,	Motion to Dismiss
Respondent.	

DECISION AND ORDER

The District of Columbia Department of Health, respondent, ("Department") has moved to dismiss an unfair labor practice complaint ("Complaint") filed by the American Federation of Government Employees, Local 2978, complainant, ("Union"). As the Complaint fails to state an unfair labor practice claim, the motion to dismiss is granted.

I. Statement of the Case

The Complaint alleges that the Department changed without bargaining a past practice regarding leave to attend union-sponsored programs. The Union alleges the Department changed its practice from one of granting administrative leave to attend union-sponsored programs to a practice beginning February 2014 of granting administrative leave for only half of the time the program is taking place.

The Complaint states that the parties' collective bargaining agreement ("CBA") provides that employees may be granted administrative leave to attend union-sponsored programs and training if the Office of Labor Relations and Collective Bargaining ("OLRCB") approves such leave. (Complaint ¶ 4.) The Union alleges that until recently the Department's management and OLRCB "routinely granted paid administrative leave for the entirety of time an employee attends an approved program." (Complaint ¶ 5.) The Union alleges that the routine granting of administrative leave for the duration of union-sponsored programs is a past practice "with respect to a mandatory subject of bargaining." (Complaint ¶ 7.) Starting in February 2014 and continuing to the present, the Department and OLRCB allegedly changed that practice. The

Union alleges that they still approve leave for attendance at union-sponsored programs but have "refused to pay administrative leave for the entirety ordering that employees must instead use their annual leave for half of the time that the program is taking place." (Complaint ¶ 6.) "By unilaterally ceasing its past practice of granting paid administrative leave to employees for the duration of their attendance at approved union sponsored programs," the Complaint alleges, "management has committed an unfair labor practice in violation of D.C. Code §§ 1-617.01(b) and (c) and 1-617.04(a)(1) and (5)." (Complaint ¶ 8.)

The Department moved to dismiss the Complaint, arguing that a unilateral change in bargainable terms and conditions of employment is not an unfair labor practice where, as here, the collective bargaining agreement specifically covers such terms and conditions. The Department's motion is before the Board for disposition.

II. Discussion

Generally, a unilateral change in employees' existing terms and conditions of employment is a violation of an employer's bargaining obligation under the Comprehensive Merit Personnel Act. *Dist. Council 20, AFSCME Locals 1200, 2776, 2401 & 2087 v. D.C. Gov't*, 46 D.C. Reg. 6513, Slip Op. No. 590 at 3-4, PERB Case No. 97-U-15A (1999). *See also AFGE, Local 2978 v. D.C. Dep't of Health*, 59 D.C. Reg. 10736, Slip Op. No. 1275 at 3, PERB Case No. 11-U-12 (2012) (holding that a unilateral change in a past practice is an unfair labor practice (citing *Dist. Council 20 AFSCME Locals 1200, 2776, 2401 & 2087*, 46 D.C. Reg. 6513, Slip Op. No. 590, PERB Case No. 97-U-15A)).

The Board has recognized a pertinent exception to that general rule. A unilateral change in established and bargainable terms and conditions of employment does not constitute an unfair labor practice when such terms and conditions are specifically covered by the parties' collective bargaining agreement. *Univ. of D.C. Faculty Ass'n/NEA v. Univ. of D.C.*, 43 D.C. Reg. 5594, Slip Op. No. 387 at 2, PERB Case Nos. 93-U-22 and 93-U-23 (1994). A past practice is an unwritten term and condition of employment. *F.O.P./Metro. Police Dep't Labor Comm. v. D.C. Metro. Police Dep't*, 60 D.C. Reg. 9212, Slip Op. No. 1391 at 22, PERB Case Nos. 09-U-52 and 09-U-53 (2013). Therefore, a unilateral change in a past practice does not constitute an unfair labor practice when such terms and conditions are specifically covered by the parties' collective bargaining agreement. The resolution of an issue regarding a change in a past practice covered by a contractual provision "is subject to the contractual grievance procedure." *Univ. of D.C. Faculty Ass'n/NEA*, 43 D.C. Reg. 5594, Slip Op. No. 387 at 3 n.1, PERB Case Nos. 93-U-22 and 93-U-23.

The Union erroneously seems to regard a past practice as a special case that is not subject to the principles that apply to other terms and conditions of employment. In its opposition, the Union stresses that it has pleaded and can prove a unilateral change in a past practice but does not dispute the Department's claim that the CBA specifically covers that past practice. The Union asserts that *AFGE, Local 2978 v. D.C. Department of Health*, 59 D.C. Reg. 10736, Slip Op. No. 1275, PERB Case No. 11-U-12 (2012), is an analogous case that establishes that the

Complaint alleges a statutory violation. In that case, which involved the same parties as the present case, the Board held that the Department committed an unfair labor practice by unilaterally changing its past practice of allowing its employees more administrative leave for voting than required by the District Personnel Manual. The Department did not file an answer or otherwise assert that the alleged past practice was specifically covered by the parties' contract, and the Board did not address that issue in its opinion. Thus, the case stands for the general proposition that a unilateral change in a past practice is an unfair labor practice, *see supra* p. 2, but does not address the exception that applies where a collective bargaining agreement covers the past practice, which is the issue raised by the Department's motion to dismiss.

For purposes of the Department's motion to dismiss, we take all allegations pleaded in the Complaint as true and view the pleadings in the light most favorable to the complainant. *See Alston v. AFSCME Local 1959*, 61 D.C. Reg. 9771, Slip Op. No. 1485 at p. 3, PERB Case No. 13-U-27 (2014); *Washington Teachers' Union, Local 6 v. D.C. Pub. Schs.*, 45 D.C. Reg. 5075, Slip Op. No. 552 at p. 1, PERB Case No. 98-U-07 (1998). Thus, for present purposes we accept as true that the Department had a past practice of "routinely granting paid administrative leave to employees for the duration of their attendance at approved union sponsored programs" (Complaint ¶ 7) and that the Department unilaterally ended that past practice. (Complaint ¶ 8). Rule 520.10 permits the Board to render a decision upon the pleadings if its investigation reveals that there is no issue of fact to warrant a hearing. The parties' CBA was attached to the Complaint as an exhibit and thus is among the pleadings filed in the case.

The issue presented by the pleadings is whether the CBA specifically covers the Department's past practice of granting administrative leave for the duration of union-sponsored programs. Article 6, section 4 of the CBA provides, "Administrative leave shall be granted in accordance with Article 34, Section 4B(2)." (Complaint, Ex. at 6.) In turn, article 34, section 4B(2) provides, "Attendance at Union sponsored programs will be on approved annual leave or leave without pay unless Administrative Leave has been approved by the Office of Labor Relations and Collective Bargaining." (Complaint, Ex. at 29.) The CBA thus establishes that the general rule is that employees take annual leave or leave without pay for union-sponsored training and that use of administrative leave is the exception. The two provisions of the CBA together provide, in mandatory terms, the condition and the procedures for granting administrative leave to attend union-sponsored training. Those provisions specifically cover the past practice that the Department allegedly ended.

Therefore, the Complaint's allegations do not constitute violations of rights protected under the Comprehensive Merit Personnel Act as unfair labor practices or other causes of action within the Board's jurisdiction but instead concern matters governed by the parties' contract. A claim that is contractual in nature, though presented as an allegation of a unilateral change in a past practice or other terms and conditions of employment, is not within the statutory authority of the Board. *See Council of Sch. Officers, Local 4 v. D.C. Pub. Schs.*, 59 D.C. Reg. 6138, Slip Op. No. 1016, PERB Case No. 09-U-08 (2010); *Univ. of D.C. Faculty Ass'n/NEA v. Univ. of D.C.*, 43 D.C. Reg. 5594, Slip Op. 387 at 2-3, 3 n.1, PERB Case No. 93-U-22 (1994). Accordingly, the Complaint must be dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. The respondent's motion to dismiss is granted. The Complaint is dismissed.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairman Charles Murphy and Members Donald Wasserman, Keith Washington, Ann Hoffman, and Yvonne Dixon

Washington, D.C.

December 22, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served upon the following parties via File and ServeXpress on this the 23d day of December 2014.

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Secretary