GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
University of the District of Columbia Faculty Association, NEA,	)	
Complainant,	)	PERB Case No. 90-U-10
	)	Opinion No. 272
v.	)	
University of the District of Columbia,	)	
Respondent.	)	

DECISION AND ORDER

On February 13, 1990, the University of the District of Columbia Faculty Association, NEA (UDCFA) filed an unfair labor practice complaint (Complaint) with the D.C. Public Employee Relations Board (Board) alleging that the University of the District of Columbia (UDC) violated the Comprehensive Merit Personnel Act of 1978 (CMPA) D.C. Code Sections 1-618.4(a)(1), (2),(3) and (5) by its failure and refusal to comply with UDCFA's request for certain information concerning within-grade increases of bargaining-unit employees. UDC denied the commission of any unfair labor practice by Answer filed February 28, 1990. The Board, by notice issued May 18, 1990, ordered a hearing before a duly designated hearing examiner.

The Hearing Examiner, in a Report and Recommendation (R&R) issued on October 15, 1990, (a copy of which is attached hereto as Appendix 1), concluded that UDC had failed to bargain collectively in good faith with UDCFA by failing to provide it with information reasonably necessary and relevant to processing a grievance on behalf of bargaining-unit members (R&R at p.11). [1]/ Observing that previous decisions by the

[1]/ The Hearing Examiner found that the purpose of the information request, i.e., "the name of each faculty member who was not evaluated 'Less than Satisfactory' for the prior year who did not receive a within grade increase for the 1987-88 and/or 1988-89 academic years, unless he or she was already at the top step within grade," was to confirm whether or not an undetermined number of bargaining-unit employees received their appropriate within-grade

Board "have firmly established an exclusive representative's entitlement to information which will permit it to function in its representative capacities" (R&R at p. 8), [2]/ the Examiner ruled that UDC had a duty to provide the requested information for which "involved the matter of faculty step increases, i.e., wages," and therefore "was both relevant and necessary to a legitimate collective bargaining function to be performed by the Association, i.e., the investigation, preparation and processing of grievances under the negotiated grievance procedure." (R&R at p.9. [3]/) On the basis of the testimony of UDC officials (Tr. at 12 - 15), the Examiner rejected UDC's contention that notwithstanding any duty to provide, the requested information was simply unavailable, finding instead that the information sought was "either readily available to responsible UDC officials or of a type which could be readily compiled [without] undue burden" (R&R at p.9.) He rejected also UDC's argument that it had no duty to provide the information because UDCFA was precluded from pursuing the grievance for which UDCFA claimed the information was requested. The Examiner was unpersuaded by UDC's contention that a provision in the parties' collective bargaining agreement pertaining to within-grade increases was merely a reflection of "historical fact" to which UDCFA, by its execution of the collective bargaining agreement, agreed to be bound. The Examiner concluded instead that the parties' collective bargaining agreement contained (1) no express waiver of the right to file a

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(footnote 1 Cont'd)
step increases in preparation for filing a grievance pursuant to Article XVIII, Section C(2) of the parties' collective bargaining agreement. (R&R at pp. 2, 5 and 6.)

[2]/ American Federation of State, County and Municipal Employees v. D.C. General Hospital, et al., 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989); International Brotherhood of Teamsters, Local 639 and 730 v. D.C. Public Schools, 36 DCR 5993, Slip Op. No. 226, PERB Case No. 88-U-10 (1989) and University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, 36 DCR 2469, Slip Op. No. 215, PERB Case No. 86-U-16 (1989). The Examiner also noted the earlier, similar U.S. Supreme Court decision in NLRB v. ACME Industrial Co., 385 U.S. 432, 436 (1967), ("the employer's duty to disclose unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement"). (R&R at p.8.)

[3]/ Citing the landmark case of NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) and Electrical Workers v. NLRB 648 F.2d 18 (D.C. Cir. 1980), the Hearing Examiner found information on employee wages to be "presumptively relevant."

grievance concerning matters covered under the provision and (2) a grievance procedure sufficiently broad in scope to encompass a grievance on the issue. (R&R at pp. 10 - 11.) [4]/

Finally, the Examiner recommended denial of UDCFA's request for an award of costs including attorney fees incurred in pursuing this matter. The Hearing Examiner based his ruling on his findings and conclusions that (1) UDCFA "has failed to state ... any of the costs it has incurred in pursuing this matter"; (2) "money damages (other than back pay), even where allowable, are not generally made in labor tribunals"; (3) UDC's defense to the action was not entirely without merit; and (4) with respect to attorney fees, the "American Rule," that attorney fees are generally not recoverable unless there is an explicit statutory or contractual basis for their entitlement, is appropriate "in the absence of explicit statutory authority [in the CMPA] on the question of attorney fees" and "the presence of at least one meritorious defense". (R&R at p.12.)

On November 7, 1990, UDC filed Exceptions to the Hearing Examiner's Report and Recommendation. No Exceptions were filed by Complainant which did, however, file a Response to UDC's Exceptions. UDC excepts to the Hearing Examiner's factual findings and conclusions of law in support of his conclusion "that the University's argument for dismissing the complaint on the basis that Complainant has raised an inappropriate issue under the [parties' collective bargaining agreement]" should be rejected (R&R at p. 11). We have considered UDC's Exceptions, which are discussed below. We adopt the Hearing Examiner's findings and conclusions to the extent consistent with this Decision and Order.

The crux of UDC's exceptions lies in its contention that no duty exists under the CMPA for an employer to provide information upon request to a union concerning matters arising under the term of the collective bargaining agreement to which they are a party. UDC argues that unlike Section 8(d) of the National Labor Relations Act (NLRA) the CMPA does not spell out the meaning of

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[4]/ The Hearing Examiner rejected the charges that UDC had violated D.C. Code Sec. 1-618.4(a) (1),(2) and (3), concluding that UDCFA had not provided sufficient evidence to warrant a finding of violation. No exceptions have been filed concerning these allegations. We agree with the Examiner's assessment and hereby dismiss these charges.

the employer's duty to bargain collectively. [5]/ UDC suggests that the 8(d) language in the NLRA was the (necessary) predicate for the Supreme Court's recognition of the NLRB's authority to require an employer to furnish information concerning grievances or other questions arising under the parties' collective bargaining agreement in NLRB v. ACME, supra n.2 at 436-37 (1967).

While UDC correctly notes that the CMPA and the NLRA are not identical, we have long held that the employer's duty under the CMPA includes furnishing information that is "both relevant and necessary to the Union's handling of the grievance" Teamsters, Local 639 and 730 v. D.C. Public Schools, supra, Slip Op. No. 226 at p.4, and that this obligation "flow[s] from th[e] duty to bargain in good faith." American Federation of State, County and Municipal Employees v. D.C. General Hospital, et al., supra, Slip Op. No. 227 at p.3. [6]/

Moreover, the Supreme Court based its ruling in ACME, supra, on Section 8(a)(5) of the NLRA which, in language followed in the CMPA, Sec. 1-618.4(a)(5), prohibits an employer from refusing to bargain collectively with the representative of its employees. The Court merely referred to Section 8(d) of the NLRA as "amplif[ying] by defining 'to bargain collectively'." 385 U.S. at 436. Thus, UDC's contention that the Board is without authority under the CMPA to require an employer to furnish such

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[5]/ NLRA Sec. 8(d) provides that "...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder...[.]"

[6]/ UDC avers that UDCFA's request for information was made in bad faith and therefore UDC had no statutory duty to provide the information. In support of this exception, UDC quarrels with the Examiner's credibility determination and again asserts that no grievance is maintainable on these matters. We find nothing in the record to warrant a reversal of the Hearing Examiner's findings of fact on evidence that he duly considered (see R&R at pp. 5-6 and pp. 10-11), nor do we believe it is the Board's role to determine conclusively the meaning of contract provisions under which a grievance may (or may not) be filed and, if filed may (or may not) be sustained. Cf., ACME, 385 U.S. at 437-38.

information is unfounded. [7]/

With respect to the Teamsters' request for costs and attorney fees, our criteria for awarding costs pursuant to D.C. Code Section 1-618.13 were announced in AFSCME District Council 20, Local 2776, AFL-CIO v. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245 at pp. 4 - 5, PERB Case No. 89-U-02 (1990). Applying those criteria here, we find an award of costs would not be in the "interest of justice" and therefore make no award. We also note that Section 1-618.13 does not refer to attorney fees, nor are we elsewhere given authority to award attorney fees.

For the foregoing reasons, we adopt the recommendations of the Hearing Examiner that Respondent UDC be found to have failed and refused to provide upon request information relevant and necessary to the performance of UDCFA's duties under the CMPA, and that by this failure and refusal the Respondent violated D.C.

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[7]/ We also find UDC's two remaining arguments unsupported by the record and thus without merit.

UDC contends that a grievance for which the information was sought would be untimely and therefore the information was not relevant and necessary for the performance of UDCFA's statutory duties. UDC acknowledges that under the parties' collective bargaining agreement a grievance is timely if filed "within 10 days of the occurrence or when the occurrence should have been discovered." (UDC Excep. at p. 9.) UDC's refusal to furnish the information prevented UDCFA from discovering whether or not a contractual violation had occurred. The Hearing Examiner found that UDCFA became aware only on December 13, 1989 that there "might" have been a violation of the parties' collective bargaining agreement and did so via UDC testimony at an arbitration hearing, and its request for the information followed promptly. (R&R at pp. 5-6.) UDC cites nothing that would show that a contractual violation should have been earlier discovered by UDCFA.

Finally, UDC argues that "[t]he contract language purportedly breached, merely states a past fact," and is not grievable. The Board found no merit in the same argument in AFSCME Council 20, AFL-CIO v. D.C. General Hospital, 36 DCR 7101, Slip Op. No. 227 at p. 4, PERB Case No. 88-U-29 (1989). There, the Board ruled that "arbitrability [is] an initial question for the arbitrator[.]" The Board found that the Union would need the information "to support its position in the arbitration proceeding in the event that the grievance was found arbitrable."

Code Sec. 1-618.4(a)(5) and (1) of the CMPA. [8]/

ORDER

IT IS ORDERED THAT:

1. University of the District of Columbia (UDC) shall cease and desist from refusing to furnish University of the District of Columbia Faculty Association (UDCFA) with the name of each faculty member who was not evaluated 'Less than Satisfactory' for the academic years immediately preceding 1987-88 and/or 1988-89, who did not receive a within grade increase unless he or she was already at the top step within grade.

2. UDC shall provide the information requested, as specified in paragraph 1 of this Order, not later than (14) days following the issuance of this Opinion.

3. UDC shall cease and desist from interfering, in any like or related manner, with the rights guaranteed employees by the Comprehensive Merit Personnel Act.

4. UDC shall post copies of the attached Notice conspicuously at all of the affected work sites for thirty (30) consecutive days.

5. UDC shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of the date of this Order that the information specified in paragraph No. 1 of this Order has been provided to UDCFA and that the Notices have been posted accordingly.

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

May 9, 1991

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[8]/ The Hearing Examiner, while concluding that UDC violated D.C. Code Section 1-618.4(a)(5), did not rule on the allegation that by the same conduct UDC violated D.C. Code Section 1-618.4 (a)(1). We hereby correct that error and find a derivative violation of D.C. Code Section 1-618.4(a)(1) for the reasons stated in AFSCME, Local 2776 v. Department of Finance and Revenue, 37 DCR 5658 Slip Op. No. 245, PERB Case No. 89-U-02 (1990).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of: University of the District of Columbia Faculty Association/NEA, Complainant, and University of the District of Columbia, Respondent.	PERB Case No. 90-U-10 Opinion No. 272 (Erratum)

ORDER

This Order corrects an error on page 5 of the Board's Slip Opinion in the above-captioned matter appearing at 38 DCR 3463 (May 31, 1991). In the first paragraph, the 1st line, the sentence beginning "With respect to the Teamsters'..." is hereby corrected to the following: "With respect to UDCFA's..."

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

July 2, 1991

PERB
Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL FACULTY MEMBERS OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA (UDC): THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 272, PERB CASE NO. 90-U-10.

WE HEREBY notify our employees that the Public Employee Relations Board has found that we violated the law and has ordered us to post this Notice.

WE WILL cease and desist from refusing to provide the University of the District of Columbia Faculty Association (UDCFA) with requested information relevant and necessary to its representational duties.

WE WILL provide UDCFA with the requested names of each faculty member who was not evaluated "less that satisfactory" for the academic years immediately preceding 1987-88 and/or 1988-89, who did not receive within grade increases, unless he or she was already at the top step within grade.

WE WILL NOT in any like or related manner interfere with UDCFA's exercise of rights guaranteed to it by the Comprehensive Merit Personnel Act as the exclusive representative of a unit of employees at UDC.

UNIVERSITY OF THE
DISTRICT OF COLUMBIA

DATE:_____

BY:_____
President