Government of the District of Columbia
Pubic Employee Relations Board

Fraternal Order of Police/Department of Corrections Labor Committee (on behalf of Yamica Drayton),	
Complainant,	PERB Case No. 08-U-20
v.	Opinion No. 971
Adrian M. Fenty, Mayor of the District of Columbia,	**Motion for Preliminary Relief**
Devon Brown, Director, Department of Corrections, District of Columbia, and	
District of Columbia Department of Corrections,	
Respondents.	

DECISION AND ORDER

I. Statement of the Case:

The Fraternal Order of Police/Department of Corrections Labor Committee ("FOP" or "Complainant") filed an Unfair Labor Practice Complaint ("Complaint") and a Motion for Preliminary Relief ("Motion") "against the District of Columbia Department of Corrections . . . its agents and representatives, including, but not limited to, Director Devon Brown . . .". (Compl. at p. 1). The Complainant alleges that the District of Columbia Department of Corrections ("DOC" or "Respondents") has violated D.C. Code §§1-617.04(a)(1), (3) and (4)[1]

[1]D.C. Code §1-617-04 provides in relevant part as follows:

(a) The District, its agents, and representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employee in exercise of the rights guaranteed by this subchapter;

"by interfering with, restraining and coercing Union members in exercising their rights under the [parties' collective bargaining agreement]." (Compl at p. 7). Specifically, FOP asserts that "DOC violated DC law by discriminating against [bargaining unit member Yamica] Drayton by reassigning her immediately after she testified for the union and retaliating against her (by terminating her) as a direct result of her appearance [as a witness at an October 24, 2007 unfair labor practice hearing] . . . These actions were compounded by [DOC's] attempts to cover up its actions by punishing additional Union members in a similar manner shortly thereafter." (Compl. at pgs. 7-8).

FOP is requesting that the Board: (a) grant its request for preliminary relief;[2] (b) order DOC to cease and desist from violating the Comprehensive Merit Personnel Act; (c) authorize discovery and hold evidentiary hearings to determine whether an unfair labor practice has been committed; (d) order that Ms. Drayton be reinstated with full back pay and benefits; (e) prohibit DOC from "exercising any additional shift changes until Impact and Effects Bargaining can take place between the Union and [DOC]" (Motion at p. 6); and (f) grant its request for reasonable costs. (See Motion at pgs. 5-6 and Compl. at pgs. 12-13).

DOC filed an opposition ("Opposition") to the Motion and an answer ("Answer") to the Complaint denying any violation of the Comprehensive Merit Personnel Act ("CMPA"). DOC has requested that the Motion be denied. FOP's Motion and DOC's Opposition are before the Board for disposition.

II. Discussion:

Yamica Tyefe Drayton began her employment with DOC on February 22, 2004. At the time of her termination, Ms. Drayton was employed at the D.C. Jail as a Legal Instruments Examiner, and was assigned to the 7:30 a.m. to 4:00 p.m. shift in the DOC's Records Department. (See Compl. at p. 4). Prior to that, she worked in the Office of the Deputy Director of the DOC and the mail room in the administrative offices of the DOC. FOP claims that at the

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> (3) Discriminating in regard to hiring or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;
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> (4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint given any information or testimony under this subchapter; or
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> . . .

[2]In the alternative FOP seeks an expedited hearing schedule. (See Motion at p.2, n.2).

time of her termination, Ms. Drayton served as a union shop steward, representing members of the bargaining unit working within the DOC Records Department.[3] (See Compl. at p. 4).

On or about October 22, 2007, Ms. Drayton was served with a subpoena to appear as a witness for the FOP in an October 24, 2007 hearing concerning PERB Case No. 06-U-50. FOP claims that on October 22, 2007, Ms. Drayton provided her supervisor with a copy of the subpoena. (See Compl. at p. 4).

On October 24, 2007, Ms. Drayton appeared at the Board's office in order to testify at a scheduled hearing involving PERB Case No. 06-U-50. "During her appearance, Ms. Drayton provided testimony about the disciplinary issues and training deficiencies within the DOC Records Department." (Compl.at p. 4). Specifically, Ms. Drayton testified: (1) about the structure of the Records Department; and (2) that in her opinion there are too many supervisors who give inconsistent direction and increase the stress levels of the employees because there are too many differing opinions on how work should be performed. (See Compl. at pgs. 4-5).

"Ms. Drayton also testified concerning the issue of Term Employees, and explained that although Term Employees are supposed to be first in line when positions open within [DOC], that is not the actual practice of the DOC. She indicated that most of the employees in the Records Department are Term Employees. In addition, Ms. Drayton discussed her own status as an employee - she was a Term employee upon being hired, but believed herself no longer to be a Term Employee at the time of her. . . October, 2007 [testimony]. [Ms. Drayton] understood that there was an administrative error in her personnel paperwork because it indicated she was still a Term Employee, four years after she was hired." (Compl. at p. 5).

"Ms. Drayton also testified as to her involvement with the Union, and the relationship between Union membership and Term Employees. [FOP notes that Ms. Drayton] understood herself to be a Union member because upon being hired, all the requisite Union paperwork was completed and signed, and dues were deducted from her paycheck throughout the duration of her employment. In addition, [FOP claims that Ms. Drayton] served as a Union Shop Steward until her termination." (Compl. at p. 5).[4]

The day after the hearing (October 25, 2007), Ms. Drayton returned to work and was handed an envelope containing two documents. One document was notice that she was being

[3]FOP stated that Ms. Drayton became a union shop steward in September 2007. (See Compl. at p. 4).

[4] "Ms. Drayton testified that all Term Employees complete Union paperwork upon being hired and have Union dues deducted. Despite this, however, they are not afforded any Union protections when disciplined." (Compl. at p. 5).

reassigned to work the midnight shift.[5] The other document stated that she was AWOL (absent without leave). (See Compl. at p. 5). "Even though the [s]upervisor who signed the AWOL document was present [when Ms, Drayton was served], she did not answer any of Ms. Drayton's questions about the notices, and instead referred her to the [DOC's] Time and Attendance Department with questions." (Compl. at p. 6).

"Ms. Drayton questioned her supervisors [concerning] the shift change, and she was told it was her time to move to another shift. . . cit[ing] the rule that shift changes are to be made within 90 days ('90 day rule') as the reason for the reassignment." (Compl at p. 6). FOP states that "Ms. Drayton had been on that shift much longer than that, as is common practice in the department, apparently it was now time for her shift to be changed." (Compl at p. 6). FOP asserts that while the supervisors "invoked the [90 day rule] as. . . the reason for the shift change, Ms. Drayton testified that the rules were not being applied equally to all. For example, some people who had been in the department much longer than Ms. Drayton had never been transferred to the midnight shift." (Compl. at p. 6).

On October 26, 2007, Ms. Drayton appeared for a second time before the Hearing Examiner conducting the hearing in PERB Case No. 06-U-50 in order to "inform the Hearing Examiner of her reassignment immediately upon returning to work after her appearance. [At her October 26th appearance]. In addition, Ms. Drayton testified that no other permanent employees of the department were being reassigned." (Compl. at. 6).

FOP states that although the explanation given by management for Ms. Drayton's reassignment was the 90 day rule, FOP asserts that the reason given for the reassignment "was a pretext for retaliation" for Ms. Drayton's October 24, 2007 testimony. (Motion at p. 4). In support of this position, FOP asserts that the 90 day rule was not a policy or practice [DOC] implemented with any regularity for the employees of the Records Department. (See Compl. at p. 6). FOP states that "[w]hen asked why she felt she was being transferred, Ms. Drayton testified she was being retaliated against, and singled out for her activity."[6] (Compl. at p. 6).

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[5]DOC contends that Ms. Drayton's reassignment papers were prepared prior to the October 24, 2007 hearing. (See Opposition at p. 6). FOP disputes this fact. Specifically, FOP asserts that the documents reassigning Ms. Drayton were prepared on the day of her October 24, 2007 testimony in PERB Case No. 06-U-50. (See Compl. at p. 5, n. 4).

[6]At the October 26, 2007, hearing DOC's attorneys argued that Ms. Drayton's transfer was "an unfortunate coincidence." (Transcript of PERB Case No. 06-U-50 at p. 571) . . . In support of this position, counsel for DOC offered to "bring. . . people to testify under oath that Ms. Drayton's transfer was drafted on October 23, 2007." (Transcript of PERB Case No. 06-U-50 at p. 571) . Therefore, DOC asserted that Ms. Drayton's transfer could not be considered a reprisal for the content of her testimony. (See Transcript of PERB Case No. 06-U-50 at pgs. 571-572). "Counsel for the [FOP asserted] that could not be true because Ms. Drayton's supervisors [were given notice on October 22, 2007, that] she had been subpoenaed to appear." (Compl. at p. 7).

FOP asserts that "[a]s a result of the shift change notification, Ms. Drayton was slated to move to the midnight shift on December 12, 2007. Before her shift change on December 12, however, she was put on administrative leave and then summarily fired." (Compl. at p. 7).

FOP argues that "[e]ven if [DOC's] counsel was correct that the transfer was not a reprisal, then certainly Ms. Drayton's subsequent termination was. [In support of this argument FOP notes that] [s]hortly after the hearings in [PERB Case No. 06-U-50], Ms. Drayton was terminated.." (Compl. at p. 7).

FOP claims that DOC's violation of the CMPA is clear-cut and flagrant. (See Motion at p. 4). In support of its position FOP asserts that:

> Here, . . the conduct of the Agency. . . is clear-cut and flagrant. Ms. Drayton testified (unfavorably to the Agency) on Wednesday, October 24, and on Thursday, October 25, she was ordered to be transferred to a different shift . . .The Agency offered the policy of mandatory shift change every 90 days as the reason behind Ms. Drayton's shift transfer. However. . . this was a pretext for retaliation; the Agency's justification for transferring Ms. Drayton was nothing more than an excuse. (Motion at p. 4).
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> [Furthermore, Ms. Drayton] protested the [shift transfer,] and appeared again before the Board to report the retaliation. Shortly thereafter, she was terminated. (Compl. at p. 10).

Also, FOP asserts that "[c]hanging Ms. Drayton's shift [one day after her testimony with no opportunity for her to appeal,] caused a hardship for her and [the Board's] ultimate remedy . . . may be inadequate." (Motion at p. 4). Therefore, FOP contends that preliminary relief is appropriate in this case.

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15, which provides in pertinent part as follows:

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

The Board has held that its authority to grant preliminary relief is discretionary. See, *AFSCME, D.C. Council 20, et al. v. D.C. Government, et al.*, 42 DCR 3430, Slip Op. No. 330, PERB Case No. 92-U-24 (1992). In determining whether or not to exercise its discretion under Board Rule 520.15, this 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 harm need not be shown. However, the supporting evidence must "establish that there is reasonable cause to believe that the [NLRA] has been violated, and that remedial purposes of the law will be served by *pendente lite* relief." *Id.* at 1051. "In those instances where [this] Board [has] determined that [the] standard for exercising its discretion has been met, the bases for such relief [has been] restricted to the existence of the prescribed circumstances in the provisions of Board Rule 520.15 set forth above." *Clarence Mack, et al. v. FOP/DOC Labor Committee, et al.*, 45 DCR 4762, Slip Op. No. 516 at p. 3, PERB Case Nos. 97-S-01, 97-S-02 and 95-S-03 (1997).

In its response to the Motion, DOC asserts that FOP's "request for preliminary relief is unwarranted and should be denied." (Opposition at p. 2). DOC argues that "[i]n this case, Complainant does not meet the threshold requirement for obtaining preliminary relief; and even if it did, its allegations do not meet the prescribed criteria of Board Rule 520.15." (Opposition at p. 2).

In addition, DOC contends that since the facts central to the resolution of this case are in dispute, preliminary relief should not be granted. (See Opposition at p. 9). Specifically, DOC asserts the following:

> Ms. Drayton's shift transfer was a part of the Record Office's regular shift rotation schedule designed to train probationary employees. Complainant alleges that Ms. Drayton was transferred the day after being subpoenaed to testify at an unfair labor practice hearing "without prior notification or any substantive justification," . . . . This is untrue. In a memo dated October 23, 2007, Ms. Drayton, along with other Records Office employees, was notified that their shift would be changing effective November 4, 2007. . . This gave Ms. Drayton approximately two weeks notice of her pending shift change. Furthermore, the substantive justification for the shift rotations is so that all LIEs can gain overall experience with the operation of the Records Office. . . Likewise, Ms. Drayton's termination was appropriate and non-retaliatory. DPM Chapter 8, Section 814.1 provides that "an agency shall terminate an employee during the probationary period whenever his or her work performance or conduct fails to demonstrate his or her suitability and qualifications for continued employment." (Opposition at p. 6).
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> The fact that Ms. Drayton received her notice the day after she testified in an unfair labor practice hearing is completely

> coincidental. DOC had no retaliatory intent in instigating Ms. Drayton's shift change.[7] (Opposition at p. 3).

After reviewing the pleadings, it is clear that the parties disagree on the facts in this case. On the record before us, establishing the existence of the alleged unfair labor practice violation turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on these pleadings alone. Also, the limited record before us does not provide a basis for finding that the criteria for granting preliminary relief have been met.

In the present case, FOP's claim that DOC's actions meet the criteria of Board Rule 520.15 is a repetition of the allegations contained in the Complaint. Even if the allegations are ultimately found to be valid, it does not appear that any of DOC's actions constitute clear-cut flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOCs' actions presumably affect Ms. Drayton and other bargaining unit members. However, FOP does not allege that Ms. Drayton's termination interfered with the work of other shop stewards. Furthermore, DOC's actions stem from a single action (or at least a single series of related actions), and do not appear to be part of a pattern of repeated and potentially illegal acts. While the CMPA prohibits the District, its agents and representatives from engaging in unfair labor practices, the alleged violations, even if determined to have occurred, do not rise to the level of seriousness that would undermine public confidence in the Board's ability to enforce compliance with the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, FOP has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate,[8] if preliminary relief is not granted. In cases such as this, the Board has found that preliminary relief is not appropriate. See *DCNA v. D.C. Health and Hospital Public Benefit Corporations,* 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

We conclude that FOP has failed to provide evidence which demonstrates that the allegations, even if true, are such that remedial purposes of the law would be served by *pendente lite* relief. Moreover, should violations be found in the present case, the relief requested can be accorded with no real prejudice to FOP following a full hearing. In view of the above, we deny the FOP's Motion for Preliminary Relief.

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[7]Also, DOC contends "that at the time of her termination, Ms. Drayton was a probationary employee, and in accordance with District Personnel Manual Chapter 8, Part 814.3, a termination during a probationary period is not appealable or grievable." (Answer at p. 6).

[8]We note that even if FOP prevails in this case with respect to Ms. Drayton's termination, reinstatement and back pay are normally considered a sufficient remedy. Therefore, FOP has failed to demonstrate that the Board's eventual remedies would be inadequate.

For the reasons discussed above, we: (1) deny FOP's request for preliminary relief; and (2) direct the development of a factual record through an unfair labor practice hearing under the expedited schedule set forth below.

ORDER[9]

IT IS HEREBY ORDERED THAT:

1. The Fraternal Order of Police/Department of Corrections Labor Committee's ("Complainant") Motion for Preliminary Relief, is denied.

2. The Board's Executive Director shall refer the Complainant's unfair labor practice complaint to a Hearing Examiner and schedule a hearing under the expedited schedule set forth below.

3. A hearing shall be scheduled in this case before September 30, 2009. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

4. Following the hearing, the designated Hearing Examiner shall submit a Report and Recommendation to the Board no later than twenty-one (21) days following the conclusion of closing arguments or the submission of post-hearing briefs.

5. Parties may file exceptions and briefs in support of exceptions no later than seven (7) days after service of the Hearing Examiner's Report and Recommendation. A response or opposition to the exceptions may be filed no later than five (5) days after service of the exceptions.

[9]This Decision and Order implements the decision reached by the Board on May 20, 2008 and ratified on July 13, 2009.

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.

August 31, 2009

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 08-U-20 was transmitted via U.S. Mail to the following parties on this the 31st day of August 2009.

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