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**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
Earnest Durant, Jr.,)	
)	PERB Case No. 07-U-43
)	
Complainant,)	Opinion No. 914
)	
v.)	Motion for Preliminary Relief
)	
District of Columbia Department of)	
Corrections,)	
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case:

On June 27, 2007, Earnest Durant, Jr. ("Complainant") filed an unfair labor practice complaint and a motion for preliminary relief against the District of Columbia Department of Corrections ("DOC"). On July 3, 2007, the Complainant filed an amended unfair labor practice complaint and a motion for preliminary relief. The Complainant asserts that DOC has retaliated against him for: (1) filing an unfair labor practice complaint against DOC; (2) requesting information from DOC related to his unfair labor practice complaint and (3) assisting union members with their unfair labor practice complaints filed against DOC. The Complainant argues that by this conduct DOC has violated the Comprehensive Merit Personnel Act ("CMPA"), as codified under D.C. Code §1-617.04 (a) (1), (3) and (4). The Complainant requests that the Board: (1) grant his request for preliminary relief; (2) order DOC to cease and desist from violating the CMPA; (3) order DOC to rescind their decision placing Complainant on administrative leave; and (4) order DOC to pay attorneys fees and reasonable costs.

DOC filed an answer denying the allegations. In addition, DOC filed an opposition to the motion for preliminary relief ("Motion") requesting that the Board dismiss the Motion. The Complainant's Motion and DOC's opposition are before the Board for disposition.

II. Discussion

The Complainant is an employee of the DOC classified as a DS 1811, Grade 11, Step 6 Criminal Investigator assigned to the DOC Warrant Squad. (See Compl. at ¶ 13). On October 24, 2006, DOC informed the Complainant that he would be retired pursuant to the Civil Service Law Enforcement Retirement System. The Complainant was retired involuntarily on December 31, 2006.

The Complainant states that in April 2007, the United States Office of Personnel Management disallowed the Complainant's retirement. As a result, on April 17, 2007, the Complainant returned to full duty with the DOC as a Criminal Investigator. (See Compl. at ¶ 14). However, the Complainant asserts that for "unknown reasons, he was not allowed to rejoin the warrant squad." (Compl. at ¶ 14). The Complainant claims that this action was taken in retaliation for his serving as an employee representative of the FOP/DOC Labor Committee. (See Compl. at ¶ 14).

The Complainant claims that on October 25, 2006 and May 9, 2007, he submitted a Freedom of Information Act ("FOIA") request to Jessica Pimentel, FOIA Officer for the District of Columbia Office of Personnel, requesting information concerning the criminal investigator positions at DOC.¹ The Complainant claims that this information was requested in conjunction with a case that was filed with the Board. (See Compl. at ¶ 15). The Complainant contends that his FOIA request was denied in retaliation for his serving as an employee representative of the FOP/DOC Labor Committee. (See Compl. at ¶ 15).

On June 14 2007, DOC Director Devon Brown informed the Complainant via letter that he was being placed on administrative leave pending the outcome of DOC's investigation of the Complainant. (See Compl. at ¶ 16). In addition, the Complainant was: (1) instructed to vacate the work site premises; (2) instructed to obtain prior permission to enter any DOC facility and (3) relieved of department issued equipment (i.e. employee identification card, keys, weapon and badge). (See Compl. at ¶ 16). The Complainant asserts that the actions taken on June 14, 2007 amounted to reprisals against the Complainant for engaging in protected activities, in violation of D.C. Code §§1-617 (a) (1), (3) and (4) and 1-617.04 (b) (1).

The Complainant claims that DOC's ongoing violations of the CMPA are deliberate, clear-cut, flagrant, widespread and adversely affect the public interest. (See Motion at p. 2). Therefore, the Complainant asserts that preliminary relief is appropriate in this case.

¹ The Complainant notes that in his FOIA request he sought, among other things, information concerning the number of authorized and budgeted DS 1811 Criminal Investigator positions.

In its response, DOC disputes material elements of the allegations asserted in the Complaint. For example, DOC asserts that it placed the Complainant on paid administrative leave because of an incident that occurred on June 13, 2007. (See Opp. at ¶1). DOC contends it is exercising management's right to conduct a full and thorough investigation consistent with regulations and past practices. DOC also claims that Complainant's FOIA requests were responded to. Letters supporting DOC's contention are in fact attached to Complainant's initial unfair labor practice charges as exhibits E and K. DOC denies that any of the actions it took were in retaliation for the Complainant's involvement in any protected activity. In addition, DOC contends that the Complainant has failed to satisfy the statutory requirements for preliminary relief. In support of this claim, DOC asserts that the Complainant has not shown, by affidavits or other evidence, that a flagrant and clear cut unfair labor practice has occurred, or, that the effect of the alleged unfair labor practice is widespread; or, that the public interest is seriously affected; or that the Board's processes are being interfered with; and, that the Board's ultimate remedy may be clearly inadequate. (See DOC's Opposition to the Motion at pgs. 3-5).

The criteria the Board employs for granting preliminary relief in unfair labor practice cases is prescribed under Board Rule 520.15.

Board Rule 520.15 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 [the Board] has determined that the standard for exercising its discretion has been met, the basis 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).

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 turns essentially on making credibility determinations on the basis of conflicting allegations. We decline to do so on the 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 cases such as this, the Board has found that preliminary relief is not appropriate. See, DCNA v. D.C. Health and Hospitals Public Benefit Corporations, 45 DCR 6067, Slip Op. No. 559, PERB Case Nos. 98-U-06 and 98-U-11 (1998).

In the present case, the Complainant's claim that DOC's actions meet the criteria of Board Rule 520.15 are a repetition of the allegations contained in the Complaint, unsupported by any affidavits or documents. Even if the allegations are ultimately found to be valid, it does not appear that any of DOC's actions constitute clear-cut or flagrant violations, or have any of the deleterious effects the power of preliminary relief is intended to counterbalance. DOC's actions presumably affect the Complainant and perhaps other bargaining unit members. However, 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 the CMPA. Finally, while some delay inevitably attends the carrying out of the Board's dispute resolution process, the Complainant has failed to present evidence which establishes that these processes would be compromised, or that eventual remedies would be inadequate if preliminary relief is not granted.

Under the facts of this case, the alleged violations and their impact do not satisfy any of the criteria prescribed by Board Rule 520.15. Specifically, we conclude that the Complainant has failed to provide evidence which demonstrates that the allegations, even if true, are such that the 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 prejudice to the Complainant following a full hearing. In view of the above, we deny the Complainant's Motion for Preliminary Relief.

For the reasons discussed above, the Board: (1) denies the Complainant's request for preliminary relief; and (2) directs the development of a factual record through an unfair labor practice hearing.

Decision and Order Concerning
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ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainant's Motion for Preliminary Relief, is denied.
- (2) The Board's Executive Director shall: (a) schedule a hearing; and (b) refer the Complainant's unfair labor practice complaint to a Hearing Examiner.
- (3) The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
- (4) 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.

September 17, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 07-U-43 was transmitted via Fax and U.S. Mail to the following parties on this the 17th day of September 2007.

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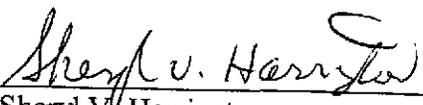
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