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

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| In the Matter of: |) | |
| |) | |
| American Federation of Government |) | PERB Case No. 13-U-26 |
| Employees, Local 383, |) | |
| |) | |
| Complainant, |) | Opinion No. 1442 |
| |) | |
| v. |) | |
| |) | Decision and Order |
| District of Columbia Office of the Chief |) | |
| Financial Officer, |) | |
| |) | |
| Respondent. |) | |
| |) | |

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 383 (“AFGE” or “Union” or “Complainant”), filed an Unfair Labor Practice Complaint (“Complaint”) against District of Columbia Office of the Chief Financial Officer (“OCFO” or “Agency” or “Respondent”), alleging OCFO violated D.C. Code §§ 1-617.04(a)(1), (3), and (5) of the Comprehensive Merit Personnel Act (“CMPA”) by: 1) failing and refusing to recognize AFGE as the exclusive representative of all employees in the bargaining unit and by coding some employees in the bargaining unit as holding “non-union” positions; 2) circumventing AFGE and applying the bargaining agreement of another union when it disciplined an employee; and 3) failing and refusing to respond to AFGE’s request for bargaining information. (Complaint, at 4).

In its Agency Response to ULP Complaint (“Answer”), OCFO denies it violated the CMPA; contends it is “not a party to and has never been a signatory to the Union’s working conditions agreement”; and asserts that it is “not subject to the [CMPA].” (Answer, at 5-6).

II. Background

A. Alleged failure and refusal to recognize AFGE as the exclusive representative of all employees in the bargaining unit and alleged coding of some employees in the bargaining unit as holding "non-union" positions

In the Complaint, AFGE asserts it is the certified bargaining representative of the bargaining unit described in *American Federation of Government Employees, Local 383, AFL-CIO and District of Columbia Department of Human Services, Office of the Controller*, Certification of Representative, PERB Case No. 80-R-06 (August 19, 1981) as:

All unrepresented employees of the Office of the Controller, Department of Human Services in the following Divisions: Grants Management, Fiscal Accounting and Financial Management, excluding officials, confidential employees, supervisors, employees engaged in personnel work other than a purely Title XVII: Labor Management Relations of the District of Columbia Comprehensive Merit Personnel Act of 1978.

(Complaint, at 1). AFGE contends OCFO "is the successor employer to the Office of the Controller" and that "the Union and the District of Columbia are parties to a master working conditions agreement [{"Agreement"}] covering the bargaining units for which the Union is the exclusive representative." *Id.*, at 2. AFGE notes that although the CBA states it expired in 1995, "it has rolled over for each successive year and remains in full force and effect pending the negotiation of a new agreement." *Id.*, Exhibit A.

In its Answer, OCFO admits it is the successor employer to the Office of the Controller, but states it "has no knowledge" of AFGE's assertion that AFGE is the certified bargaining representative of the unit described in PERB Case No. 80-R-06, *supra*. (Answer, at 1-2). Furthermore, OCFO "does not dispute" that the CBA has rolled over each year since it expired, but contends it has not violated D.C. Code §§ 1-617.04(a)(1) and (5) because it "is not a party to a master working conditions agreement with the Union" and because "OCFO is not subject to the [CMPA]." *Id.*, at 2, 5.

AFGE alleges there are some OCFO employees who are coded as belonging to the Union and who pay Union dues, and that there are others in positions within the bargaining unit who are coded as being "non-union." (Complaint, at 2). AFGE alleges it has "submitted dues authorization cards signed by employees holding positions within the OCFO" but that "OCFO has failed and refused to recognize the Union as the exclusive representative of those employees and has refused to code those employees as being members of the Union." *Id.* OCFO admits that some of its employees belong to the Union, but "[b]y information and belief," denies AFGE's allegations that some employees are coded as "non-union" and/or that AFGE submitted dues authorization cards. (Answer, at 2-3).

B. Alleged circumvention of AFGE by applying the bargaining agreement of another union in the discipline of an employee

On November 15, 2012, OCFO proposed to suspend bargaining unit member, Sheila Jackson ("Ms. Jackson") for 30 days. (Complaint, at 2). Ms. Jackson is a member of the bargaining unit and is coded as such by OCFO. *Id.* On January 18, 2013, OCFO issued a final notice of proposed suspension and suspended Ms. Jackson for 30 days. *Id.*, at 3. In both the proposal and the final notice letters, OCFO stated the discipline was in accordance with "Article 7, Section 5 of the Master Agreement between [American Federation of State, County and Municipal Employees ("AFSCME")], District Council 20 and OCFO..." *Id.*, at 2-3. AFGE alleges OCFO did not notify AFGE of either the proposed decision or the final decision, "but instead notified Robert Hollingsworth, President of AFSCME, Local 2776" despite the fact that Ms. Jackson "is not a member of AFSCME or its bargaining unit at the OCFO." *Id.*, at 3.

In its Answer, OCFO admitted it "unintentionally" cited the AFSCME contract in its discipline letters to Ms. Jackson, and that it notified AFSCME of its proposed and final decisions instead of AFGE. (Answer, at 3-4). Notwithstanding, OCFO denies it violated D.C. Code §§ 1-617.04(a)(1), (3), and (5) in so doing because "OCFO is not a party to and has never been a signatory to the Union's working conditions agreement" and because "OCFO is not subject to the [CMPA]." *Id.*, at 5.

C. Alleged failure and refusal to respond to AFGE's request for bargaining information

On April 20, 2013, AFGE sent a request for "bargaining information relevant to Ms. Jackson's termination" to LaSharn Moreland, OCFO's Human Resources Director. (Complaint, at 3-4). Specifically, the request sought:

1. Copies of all correspondence within the Agency concerning its investigation of Ms. Jackson;
2. Copies of any and all investigative reports by the Agency, including any and all related witness statements or other supporting evidence, regarding any investigation of Ms. Jackson'[s] alleged conduct on November 7, 2012;
3. Copies of all email correspondence between or among any supervisors within the Agency regarding Ms. Jackson'[s] alleged misconduct from November 7, 2012, to the present;
4. Copies of any hearing officer reports, correspondence, notes, memoranda, phone messages, etc. pertaining to Ms. Jackson'[s] alleged misconduct on November 7, 2012;

5. The name(s) of any and all Agency-sponsored trainings about employee misconduct and abuse in the workplace and any agendas, handouts, or PowerPoint presentations from those trainings. Please include the dates of the trainings and indicate those attended by Ms. Jackson;
6. Copies of all discipline(s) issued to Ms. Jackson within the last 3 years;
7. A full and correct copy of Ms. Jackson'[s] official personnel file, including complete job description; and
8. Copies of all of Ms. Jackson'[s] performance improvement plans, if any.

Id. AFGE requested that OCFO respond to the request “by no later than 5:00 p.m. on Friday, April 26, 2013. AFGE alleges that as of May 7, 2013, the date it filed its Complaint, OCFO had not responded to its request. *Id.*, at 4.

In its Answer, OCFO admits it received the request and that, as of May 7, 2013, it had not responded to it. (Answer, at 4-5). Notwithstanding, OCFO denies it violated D.C. Code §§ 1-617.04(a)(1) and (5) in so doing because “OCFO is not a party to and has never been a signatory to the Union’s working conditions agreement” and because “OCFO is not subject to the [CMPA].” *Id.*, at 6.

PERB has no record of any other pleadings having been filed in this matter. AFGE’s Complaint is therefore now before PERB for disposition.

III. Discussion

The CMPA is the statutory authority for PERB. *District of Columbia Office of the Chief Financial Officer v. American Federation of State, County, and Municipal Employees, District Council 20, Local 2776 (On Behalf of Robert Gonzalez)*, 60 D.C. Reg. 7218, Slip Op. No. 1386 at 3, PERB Case No. 12-A-06 (2013). As a result, PERB is only empowered to hear and decide legal matters that are covered by the CMPA. *Id.* The Courts defer to PERB’s interpretation of the CMPA, unless the interpretation is “unreasonable in light of the prevailing law or inconsistent with the statute” or is “plainly erroneous.” *Id.* (citing *Doctors Council of the District of Columbia General Hospital v. District of Columbia Public Employee Relations Board*, 914 A.2d 682, 695 (D.C. 2007)). Unless “rationally indefensible,” PERB’s decisions must stand. *Id.* (citing *Drivers, Chauffeurs, & Helpers, Local 639 v. District of Columbia*, 631 A.2d 1205, 1216 (D.C. 1993)).

In *OCFO v. AFSCME, Dist. Council 20, Local 2776, supra*, Slip Op. No. 1386, PERB Case No. 12-A-06, OCFO argued that PERB did not have jurisdiction over OCFO in an arbitration review request because “OCFO is expressly exempt from the [CMPA].” *Id.*, at 3. To support its argument, OCFO relied on D.C. Code § 1-204.25(a), which states:

In general. -- Notwithstanding any provision of law or regulation (including any law or regulation providing for collective bargaining or the enforcement of any collective bargaining agreement), employees of the Office of the Chief Financial Officer of the District of Columbia, including personnel described in subsection (b) of this section, shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer of the District of Columbia, and shall be considered at-will employees not covered by Chapter 6 of this title, *except that nothing in this section may be construed to prohibit the Chief Financial Officer from entering into a collective bargaining agreement governing such employees and personnel or to prohibit the enforcement of such an agreement as entered into by the Chief Financial Officer.*

Id., at 4 (emphasis added). PERB found that the plain language of the statute created “an exception that permits the Chief Financial Officer to enter into a collective bargaining agreement.” *Id.* PERB further found that OCFO’s assertion was “without merit” because it was “undisputed” that OCFO and AFSCME had entered into a collective bargaining agreement, the arbitration award at issue arose from the grievance procedure outlined in that agreement, and the D.C. Superior Court had already held that PERB had jurisdiction over the arbitration award in question because the exemption in D.C. code § 1.204.25(a) permitted “OCFO to subject itself to the CMPA under the aegis of a collective bargaining agreement.” *Id.*, at 4-5 (citing *District of Columbia v. American Federation of State, County, And Municipal Employees, District Council 20, Local 2776*, Case No. 2012 CA 004715 B. (D.C. Super. Ct. October 15, 2012). PERB therefore held that it had subject-matter jurisdiction to review the arbitration review request in accordance with the CMPA. *Id.*, at 5. OCFO did not appeal PERB’s Decision and Order.

In the instant unfair labor practice case, PERB will find that OCFO is subject to D.C. Code §§ 1-617.04 *et seq.* of the CMPA (governing unfair labor practices) if it can be established that, in accordance with the exception articulated in D.C. Code § 1-204.25(a), OCFO has entered into a collective bargaining agreement with AFGE and thus subjected itself to the CMPA under the aegis of that agreement. *D.C. v. AFSCME, supra* (D.C. Super. Ct.).

OCFO claims it “is not party to and has never been a signatory to the Union’s working condition agreement.” (Answer, at 5-6). Furthermore, while OCFO admits it is the successor employer to the Office of the Controller, it claims it has “no knowledge” of Complainant’s assertion that AFGE is the certified bargaining representative of the bargaining unit described in PERB Case No. 80-R-06, *supra*. (Answer, at 1-2).

OCFO raised a similar argument in *American Federation of State, County and Municipal Employees, District Council 20, Locals 1200, 2776, 2401 and 2087 v. District of Columbia, et al.*, 46 D.C. Reg. 6513, Slip Op. No. 590, PERB Case No. 97-U-15A (1999). In that case, OCFO argued it had no obligations under the CMPA to the complainant AFSCME locals because it was not bound by the collective bargaining agreements that were negotiated between those locals and the District agencies that were later placed under OCFO's authority. *AFSCME v. D.C., et al.*, *supra*, Slip Op. No. 590 at p. 5-9, PERB Case No. 97-U-15A. OCFO argued it was a "successor employer" as defined by *National Labor Relations Board v. Burns Security Services*, 406 U.S. 272 (1972) (in which the Supreme Court held that under certain circumstances "successor employers" are obligated to bargain with the incumbent unions of acquired bargaining units, but are not always bound to the substantive terms of the collective bargaining agreements negotiated between the unions of those bargaining units and the previous employers). *Id.*, at 7-8.

PERB rejected OCFO's argument based in part on: 1) PERB's holding in *American Federation of State, County and Municipal Employees, District Council 20, Local 1200 v. District of Columbia Office of the Controller, Division of Financial Management*, 46 D.C. Reg. 461, Slip Op. No. 503, PERB Case No. 96-UC-01 (1998) that AFSCME's employees placed under the control of OCFO were not removed from the labor-management subchapter of the CMPA; and 2) guidance from other jurisdictions that when "the functional role and employees of a public employer/agency are transferred to a new entity established to perform in the same capacity, ... the new agency is not a new employer for the purposes of collective bargaining" and "the entity [is thus] subject to the existing terms and conditions of employment contained in the collective bargaining agreement covering the employees placed under its authority." *AFSCME v. D.C., et al.*, *supra*, Slip Op. No. 590 at p. 8, PERB Case No. 97-U-15A (internal citations omitted). PERB noted its analysis was informed by factors considered in similar cases before the National Labor Relations Board ("N.L.R.B.") such as whether the "new employer uses the same facilities and work force to produce the same basic products or service for essentially the same customers in the same geographical area." *Id.* (citing *Valley Nitrogen Producers and International Union of Petroleum and Industrial Workers, Seafarers International Union of North America, AFL-CIO*, 207 N.L.R.B. 208 (1973)). In consideration of these factors, PERB reasoned that because it had already found in Slip Op. No. 503, *supra*, that the OCFO "has no separate existence outside the context of the District of Columbia Government", OCFO was not a new employer and was therefore bound by the collective bargaining agreements previously negotiated for the employees placed under its authority. *Id.*, at 8-9.

In the instant case, OCFO fails to state any authority to support its contentions that it is not a party to the Agreement AFGE provided with its Complaint and that it is not subject to the CMPA. (Answer, at 5-6). Notwithstanding, the pleadings do not provide sufficient information to definitively find at this time that OCFO's contentions are incorrect.

For instance, while in *OCFO v. AFSCME, Dist. Council 20, Local 2776, supra*, Slip Op. No. 1386, PERB Case No. 12-A-06 it was "undisputed" that OCFO and AFSCME had entered into a collective bargaining agreement, in this matter OCFO disputes that it is a party and a signatory to an Agreement with AFGE. *Id.*

Additionally, the over 18-year-old Agreement AFGE relies on fails to provide any clarity. (Complaint, Exhibit A). The title of the Agreement is "Master Agreement Between the American Federation of Government Employees Locals 383, 2737, 2741, 3406, 3444 and 3871 and the Government of the District of Columbia." *Id.* Article 1 and the signature pages indicate that the specific District agencies the Agreement was intended to bind were the Office of Labor Relations and Collective Bargaining; the Department of Human Resources, the Department of Recreations and Parks, the Department of Administrative Services, the Metropolitan Police Department, and the Office of Planning and Energy. *Id.* Neither the Office of the Controller nor OCFO are mentioned. *Id.*

Furthermore, PERB's records show that this is the first case in which AFGE has claimed the Agreement establishes a collective bargaining relationship between it and OCFO. While OCFO admits it is a party to a master compensation agreement applicable to all employees in Compensation Units 1 and 2, it asserts it is only a party to that agreement by virtue of a 2003 settlement agreement with AFSCME, not AFGE. (Answer, at 2).

Finally, PERB is unable to determine based on the pleadings currently in the record whether OCFO is bound by the Agreement's substantive terms and conditions of employment because neither party has provided any evidence to demonstrate whether the employees in the bargaining unit described in PERB Case No. 80-R-06, *supra*, perform in the same capacity as they did under the Office of the Controller and/or whether OCFO uses the same facilities and work force to produce the same basic products or services for essentially the same customers in the same geographical area as did the Office of the Controller. *AFSCME v. D.C., et al., supra*, Slip Op. No. 590 at p. 8, PERB Case No. 97-U-15A (internal citations omitted).

PERB Rule 520.8 states: "[t]he Board or its designated representative shall investigate each complaint." Rule 520.10 states that "[i]f the investigation reveals that there is no issue of fact to warrant a hearing, the Board may render a decision upon the pleadings or may request briefs and/or oral argument." However, Rule 520.9 states that in the event "the investigation reveals that the pleadings present an issue of fact warranting a hearing, the Board shall issue a Notice of Hearing and serve it upon the parties." (Emphasis added).

Based on the foregoing, PERB finds that the parties' pleadings present an issue of fact that cannot be resolved on the pleadings alone. Therefore, in accordance with PERB Rule 520.9, PERB refers this matter to an unfair labor practice hearing to develop a factual record to: 1) determine whether AFGE is the exclusive representative of the bargaining unit described in PERB Case No. 80-R-06, *supra*; 2) determine whether OCFO has entered into a collective bargaining agreement with AFGE and the employees in that bargaining unit; 3) determine whether OCFO is bound by the substantive terms and conditions of employment of the Agreement AFGE cites in its Complaint; 4) determine whether OCFO violated D.C. Code §§ 1-617.04(a)(1), (3), and (5) in the manners alleged in the Complaint; and 5) make appropriate recommendations.¹ See *Fraternal Order of Police/Metropolitan Police Department Labor*

¹ The Board considered and approved this Decision and Order during its monthly Board Meeting on October 31, 2013. On November 1, 2013, OCFO filed a Motion for Leave to File an Amended Response to the Complaint,

Committee v. District of Columbia Metropolitan Police Department, 59 D.C. Reg. 5957, Slip Op. No. 999 at p. 9-10, PERB Case 09-U-52 (2009).

ORDER

IT IS HEREBY ORDERED THAT:

1. PERB shall refer the Unfair Labor Practice Complaint to a Hearing Examiner to develop a factual record and make appropriate recommendations in accordance with said record.
2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.
3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

November 14, 2013

seeking to “clarify [its] initial responses and include affirmative defenses.” (Motion to Amend Response, at 1). The Board finds that because this matter was referred to a Hearing Examiner to develop a factual record and make appropriate recommendations prior to the filing of OCFO’s Motion, the Motion should be referred to the Hearing Examiner to consider and rule upon. *See* PERB Rule 550.13(c).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 13-U-26, Slip Op. No. 1442, was transmitted via File & ServeXpress™ and e-mail to the following parties on this the 15th day of November, 2013.

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